

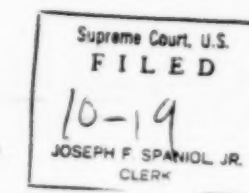
No. 90-**ORIGINAL** 8
90-6047

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THADDAEUS L. TURNER, *Petitioner*

v.

THE STATE OF CALIFORNIA, *Respondent*



EDITOR'S NOTE

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PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Thaddaeus L. Turner, asks leave to file the
accompanying petition for writ of certiorari, without payment of costs and to
proceed *in forma pauperis*. Petitioner's affidavit in support of his motion is
attached hereto.

DATED: October 19, 1990

Respectfully submitted,

Dennis A. Fischer

DENNIS A. FISCHER
1448 Fifteenth Street
Suite 206
Santa Monica, California 90404
Telephone (213) 451-4815

Counsel for Petitioner

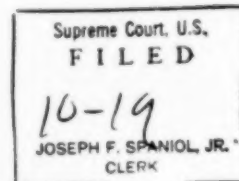
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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Thaddaeus L. Turner, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this Court are true:

1. Are you presently employed? Yes ___ No ☒

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the pasts twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ☒

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

NONE

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes ___ No ☒

a. If the answer is yes, state the total value of the items owned.

NONE

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No ☒

a. If the answer is yes, describe the property and state its approximate value.

NONE

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

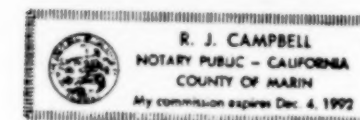
I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Thaddaeus L. Turner

SUBSCRIBED AND SWORN TO before me this 28th day of August, 1990.

Subscribed and sworn to before me this
28th day of AUGUST, 1990
Notary Public in and for the
County of Marin, State of California

R. J. Campbell
NOTARY PUBLIC



90-6047

No. 90-

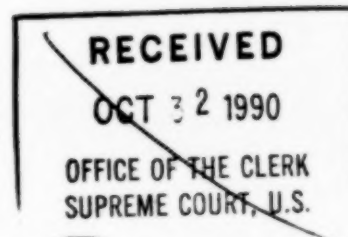
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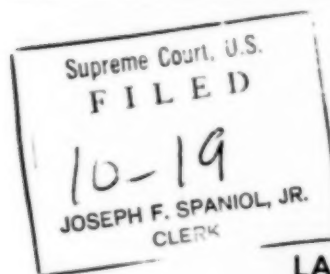
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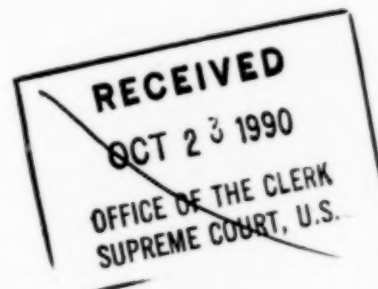


PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA



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Attorney for Petitioner



QUESTIONS PRESENTED

1. Did the California Supreme Court violate petitioner's Eighth and Fourteenth Amendment rights in finding no prejudicial error in the trial judge's failure to instruct on theft as a lesser included offense to the charge of capital first degree felony-murder with a robbery-murder special circumstances, contrary to Beck v. Alabama, 447 U.S. 625 (1980), when it engaged in harmless-error analysis through appellate factfinding to reweigh the evidence as to his guilt or innocence notwithstanding Cabana v. Bullock, 474 U.S. 376, 384-385 (1986).

2. Did the California Supreme Court violate petitioner's right to meaningful appellate review of his Eighth Amendment claim that imposition of the death sentence was arbitrary and capricious by unjustifiably relying on the holding of Pulley v. Harris, 465 U.S. 37 (1984), that comparative proportionality review is not constitutionally required, to deny petitioner an opportunity to demonstrate through an elaborate survey of California appellate decisions that many first degree murderers of equal or greater culpability had received sentences less than death? Is it necessary to clarify or even overrule Pulley v. Harris, because the California Supreme Court has read it in virtually every case as abrogating appellate review whenever the defendant contends that capital punishment has been disproportionately and freakishly imposed?

3. Did the prosecutor's argument that the jury should consider the absence of statutory mitigating factors as constituting aggravating factors violate the principle of guided discretion required by the Eighth Amendment in the jury's penalty determination?

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No. 90-

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THE STATE OF CALIFORNIA, *Respondent*
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

INTRODUCTION

The petitioner Thaddaeus L. Turner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California, affirming petitioner's conviction of murder and sentence to death by a four to two vote. Of the three issues presented for consideration, the first two arise out of the California Supreme Court's inconsistent approaches to appellate review. On the one hand, it has engaged here in expansive, speculative factfinding to cure instructional error of constitutional dimension; on the other hand, it has shut the door to any review of a capital sentence for demonstrated disproportionality with comparable cases. Petitioner asks this Court to examine (1) whether California's high court may resort to appellate factfinding in order to find that error under *Beck v. Alabama*, 447 U.S. 625 (1980), is harmless on the issue of guilt or innocence, when that form of

review has not thus far has been sanctioned except for a capital sentence, see Cabana v. Bullock, 474 U.S. 376, 383-387 (1986); cf. Carella v. California, 491 U.S. ___, 105 L.Ed.2d 218 (1989) (Scalia, J., conc.); and (2) whether the California Supreme Court has misread Pulley v. Harris, 465 U.S. 37 (1984), as abrogating comparative proportionality review even when the defendant offers substantial proof that his sentence to death violated the Eighth Amendment. A third question presented for review concerns the constitutionality of prosecutorial argument that the absence of statutorily enumerated mitigating factors should be weighed as aggravating circumstances.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of California are officially reported at 50 Cal.3d 668, and unofficially reported at 268 Cal.Rptr. 706 and 789 P.2d 887. The official report of the opinion is reproduced as Appendix A to this petition. The order denying petitioner's petition for rehearing is unreported and is attached as Appendix B.

JURISDICTION

The decision and judgment of the Supreme Court of California was filed on April 26, 1990, affirming petitioner's convictions for capital murder and robbery, and the resulting sentence of death imposed on December 21, 1984. The California Supreme Court denied a timely petition for rehearing on June 21, 1990. On September 12, 1990, Justice O'Connor signed an order extending time for filing this petition for writ of certiorari to and including October 19, 1990.

The jurisdiction of this Court is invoked pursuant to 28 United States Code section 1257(3). The principal constitutional provisions involved are the Eighth

and Fourteenth Amendments of the United States Constitution, and the statutory provisions pertinent to this case are California Penal Code sections 190.2 and 190.3. See Appendix C for verbatim statements of these authorities.

STATEMENT OF THE CASE

On May 30, 1984, petitioner was charged by information filed in the Superior Court of the State of California in and for the County of Merced (case No. 11945) with the crime of murder and the special circumstance allegation that the murder was committed in the course of a robbery. Cal. Penal Code §§ 187, 190.2(a)(17)(i). The information also alleged he had previously served a term of imprisonment for receiving stolen property. Jury trial commenced on November 6, 1984. Three days later, a charge of robbery was added. Petitioner was subsequently found guilty of both murder and robbery, and the jury also found the robbery-murder special circumstance to be true. On November 27, the jury returned its verdict of death after barely an hour's deliberations. Petitioner's motion to modify the verdict was denied on December 21, and the trial court sentenced him to death.

The murder victim, Roy Savage, was a middle-aged black man employed at Merced College where he taught mathematics and directed a program for disadvantaged youth. Divorced, Savage lived alone while his daughter was away at college. 50 Cal.3d 668-680.

Savage was last seen alive on Saturday, April 14, 1984, in petitioner's company. Shortly before the 6:00 p.m. closing time, Falahi, a salesperson at Gottschalk's Department Store, who had worked under Savage at the college, observed Savage enter the store with petitioner. Savage told Falahi that petitioner was doing some work for him, and purchased petitioner a shirt and pants for a cost

of \$20 to \$30 as compensation. Albritton, a coworker and friend of Savage, saw petitioner with Savage that same evening when Savage returned a pickup truck borrowed from Albritton earlier that week. Savage introduced petitioner to Albritton during a 30- to 40-minute conversation, and then left in his own Cadillac still accompanied by petitioner. 50 Cal.3d at 681.

On Monday, April 16, Savage's cousin Gregory Mayo arrived at Savage's home as prearranged to do yard work. Finding Savage's car was not in the garage, and the screen door wide open with the screen cut and blood on the back door, Mayo entered and found Savage's dead body lying covered on the floor inside. Mayo noticed numerous missing items, including two stereo sets, a tape cassette player, miniature speakers, wall statues, clothing, and the upstairs bedroom television set. When detectives responded to Mayo's call, they found numerous signs of a violent struggle. There were blood spatters on the front door knob and throughout the house; a coffee table had been pushed aside and its glass top was shattered and bloody; a liquor bottle on the bar was broken; and telephone cords in the family room and upstairs had been cut, but not for the kitchen phone. There was no blood on the cut cords. Mayo indicated that a stereo set was missing from the family room, but a bloody television set remained. The pattern of blood trailed from the family room to the back door and out into the enclosed rear patio, where detectives found the body lying face down covered neatly by two towels with the head resting on a pillow. Fully clothed, Savage had sustained multiple stab wounds. A gold chain he customarily wore was missing. However, two distinctive rings missing from his fingers were later discovered under a rug less than a foot from the body. A fireplace tool missing from the family room hearth was located in one of the upstairs bedrooms. In Savage's

private telephone book, the name "Thad" next to petitioner's telephone number appeared. 50 Cal.3d at 680-681.

An autopsy revealed that Savage had been stabbed over 40 times in the abdomen, chest, neck, arms, legs, hands and back. Most of the wounds were likely inflicted by a buck knife, at various angles; one wound nearly severed Savage's thumb. Some of the wounds were defensive. He had bled to death from six penetrating wounds that punctured the heart and lungs. At least two of the wounds on the body were inflicted after death. The autopsy surgeon further found seminal fluid at the tip of the victim's penis, indicating either recent sexual excitement or activity, or ejaculation at death. *Id.* at 681.¹

Petitioner was apprehended approximately 9:00 p.m. on April 16, by Highway Patrol officers in adjacent Fresno County. After observing petitioner standing next to Savage's Cadillac talking to another driver, with the door sticking out into traffic, they followed petitioner as he drove away. When the officers learned the Cadillac had been reported stolen, and seeing petitioner run a red light, they activated their siren and pulled him over. A buck knife was discovered in a scabbard on petitioner's belt. After he was taken into custody, the Cadillac was searched. The television missing from Savage's bedroom was found in the car's trunk and Savage's wallet was found in the glove compartment. There was blood in the Cadillac's trunk and on its front seat, and also on the stolen television, the buck knife, and on

¹ The foregoing facts are taken from the majority opinion. The dissenting opinion noted, however, the majority's failure to mention that Savage was six feet three inches tall and suffered from a weight problem. "The evidence is important to the defense because it suggests that decedent probably would have been able to subdue defendant in a physical attack in the absence of any weapon." 50 Cal.3d at 722 (Broussard, J., dis.).

petitioner's shoe. The blood samples were consistent with Savage's blood, but inconsistent with petitioner's. Petitioner had small scratches on his arms, but no self defense wounds or injuries. Id. at 681-682.

Testifying in his own defense, petitioner described how Savage had picked him up at a bus stop located near a homosexual bar in Fresno. Savage left his phone number with petitioner offering petitioner \$30 to do yard work for him the next weekend. Savage agreed to pick petitioner up in Fresno, some 50 miles from Merced, if petitioner had no transportation. When Savage arrived in Fresno at the appointed time, petitioner was already intoxicated on marijuana and PCP. Petitioner spent the entire afternoon with Savage, working some but also socializing with his host. Petitioner recounted the visits to Gottschalk's Department Store and Albritton's home, where they picked up Savage's Cadillac and Savage then purchased him lunch. When they returned to the house, Savage said nothing more about yard work but instead played tapes for petitioner on the stereo and served him three or four brandies. They went back to Gottschalk's where Savage purchased a shirt and pair of pants for petitioner. Again they drove to Savage's home, where petitioner listened to tapes while Savage ate a meal alone. Then Savage went upstairs, and returned wearing a t-shirt and blue shorts; he placed a hand on petitioner's shoulder and said, "Let's go to bed." Id. at 682-683.

When petitioner resisted, Savage pursued him but petitioner was able to run outside. He walked to a nearby convenience store, but Savage drove up in the Cadillac and apologized for his behavior. Accepting Savage's offer to take him home after they retrieved petitioner's coat, petitioner soon instead was confronted with Savage's insistent sexual entreaties. They argued at length, until Savage left the

room. Upon returning, Savage grabbed petitioner from behind and pinned him on the couch while choking him. Petitioner pulled the buck knife from his back pocket and attempted to stab Savage in the shoulder, but instead it struck Savage's neck. When petitioner dropped the knife, Savage picked up a fireplace tool and swung it twice at him. Approaching petitioner from behind as he attempted to retrieve the knife, Savage accidentally fell on the blade, causing severe bleeding. Nevertheless, Savage kept advancing while saying, "Baby, I love you," until petitioner stabbed him a number of times. As Savage then ran toward the patio, petitioner ran upstairs. Picking up the television to use as a weapon in case Savage continued the pursuit, petitioner went back downstairs and found Savage lying face down on the patio. Finding Savage had no pulse, petitioner removed his watch and rings. He covered the body with a blanket as he had learned from watching television. Believing it was wrong to rob a dead body, however, he decided not to take the watch and rings. He grabbed Savage's car keys, and taking along the television in panic, drove the Cadillac back to Fresno because he had no other transportation home. Id. at 684-685.

There was testimony that Savage was a sometime customer of a bar in Fresno that had a reputation as being patronized by gay persons as well as heterosexuals. Petitioner maintained he himself was not homosexual, and reacted in panic when confronted with Savage's surprise advances. A psychologist testified that petitioner's gratitude for Savage's kindness and confusion about his sudden sexual advances, in light of Savage's higher social status and petitioner's passivity, plus petitioner's consumption of alcohol and PCP and his sense of isolation from familiar surroundings, diminished petitioner's ability to cope with Savage's conduct. Id. at 685-686.

The only additional prosecution evidence at the penalty trial came from the autopsy surgeon who described in detail the number, angles, depths and force of the stab wounds in Savage's body. Petitioner presented as defense witnesses family members and a neighbor attesting to his quiet and helpful character as a child and young man, and gentle and loving qualities as an adult. One of petitioner's employers testified that petitioner had received good reports for punctuality and reliability in post-prison job placements. Id. at 687.

REASONS FOR GRANTING THE WRIT

I

THE CALIFORNIA SUPREME COURT'S REFUSAL TO FIND REVERSIBLE ERROR IN THE FAILURE TO INSTRUCT ON THEFT AS A LESSER INCLUDED OFFENSE TO THE CHARGE OF MURDER AND THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE, AND THE RESULTING SENTENCE OF DEATH, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE ERROR UNDER BECK V. ALABAMA, 447 U.S. 625 (1980) CANNOT BE CURED BY HARMLESS-ERROR ANALYSIS THROUGH APPELLATE FACTFINDING

It has long been the rule in both federal and state courts that the defendant is entitled to an instruction on a lesser included offense "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208 (1973). In Beck v. Alabama, 447 U.S. 625 (1980) this Court held that a sentence of death may not

constitutionally be imposed after a jury verdict of guilt on a capital offense, when the jury was not permitted to consider a verdict of guilt as to a lesser included non-capital offense warranted by the evidence. Accord, Spaziano v. Florida, 468 U.S. 447, 454 (1984).

In the noncapital context, the availability of a lesser included offense instruction protects the defendant from improper conviction. Schmuck v. United States, 489 U.S. ___, 103 L.Ed.2d 734, 747, n. 9 (1989). As Justice Brennan explained for the Court in Keeble, "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." 412 U.S. at 212-213. In Beck, Justice Stevens speaking for the Court concluded that because of the "significant constitutional difference between the death penalty and lesser punishments," 447 U.S. at 637, due process prohibits a state from withdrawing from the jury the option of finding the defendant guilty of a lesser included offense in a capital case. Id. at 633-638. This Court also rejected the state's argument in Beck that vesting the ultimate sentencing power in the judge would cure any harm from an erroneous conviction; this follows not only because proper instructions would forestall any opportunity to impose the death sentence, but "it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Id. at 645.

In petitioner's case all six justices of the California Supreme Court participating in the decision unanimously agreed that the trial judge "erred in failing to provide instructions and verdict forms which would permit convictions and findings based on theft rather than robbery." People v. Turner, 50 Cal.3d 668, 690 (1990).

This requirement had been recognized in two of its recent decisions in which the defendant's testimony alone supported a verdict of theft as a necessarily included offense to robbery in the context of a felony-murder prosecution. People v. Melton, 44 Cal.3d 713, 745-746 [244 Cal.Rptr. 867, 750 P.2d 741] (1988); People v. Ramkeesoon, 39 Cal.3d 346, 350-353 [216 Cal.Rptr. 455, 702 P.2d 613] (1985). Although the two dissenting justices emphasized that "[t]he right to instructions on lesser included offenses is an aspect of the fundamental fairness demanded by due process, and such instructions are required in capital cases by the federal Constitution," 50 Cal.3d at 720, citing Beck v. Alabama, *supra*, and while the constitutional foundation of the majority's recognition of the rule had been articulated in previous decisions, see Ramkeesoon, 39 Cal.3d at 351, the majority in petitioner's case failed to address the constitutional implications of its finding of error.

Instead, Justice Eagleson's opinion departed from both precedent and logic in holding that the error was harmless. In a nutshell, the majority concluded that the jury had resolved adversely to petitioner the question omitted by the instructions -- i.e., whether he was guilty of theft rather than robbery, and second degree murder rather than first degree murder, because his intent to steal arose after the killing; it relied on the jury having been correctly instructed on "after-formed intent" and the jury's adverse findings reflected in the first degree felony-murder verdict and corresponding robbery-murder special circumstance. The majority additionally took comfort in surmising that the jury would not have sentenced petitioner to death for this particularly grisly murder had it found that petitioner did not decide to steal from the victim until after stabbing him more than 40 times. 50 Cal.3d at 691-693.

Justice Broussard's vigorous dissenting opinion (joined by Justice Mosk)

pointed out that the prosecution's theory that petitioner killed the victim for the purpose of robbery, rather than committing theft as an afterthought, "is not overwhelming; it is not compelling or even very persuasive. On the record before us the conclusion that he killed in order to steal is barely plausible." 50 Cal.3d at 723. Justice Broussard particularly criticized the majority's suggestion that the error was not prejudicial because the jury had resolved the issue of when petitioner formed the intent to rob under other instructions: "However, the jury findings under those instructions were the product of the errors and may not properly be relied upon to eliminate the prejudice resulting from the errors." *Ibid.* As he noted, "When there is an error in failing to instruct on a lesser included offense, the prejudice is not eliminated by proper instructions on the elements of the greater offense." *Id.* at 725. "[O]bviously," the dissenters added, the jury had found the elements of the greater offense. Rather, the prejudice "lies in the danger that the jurors, to avoid acquittal of a confessed felon, leaned over backward to find the elements of the greater offense." *Ibid.* Ironically, Justice Broussard observed, "Use of the instructions on the elements of the greater offense to eliminate prejudice resulting from erroneous omission to instruct on the lesser would mean that the error was never prejudicial unless there was also error in the instructions on the elements of the greater." *Id.* at 725-726.

The majority's exercise in hindsight speculation about the effect upon the jury of the failure to permit consideration of theft as a lesser included offense to robbery-murder, and the corresponding special circumstance allegation, cannot pass constitutional muster. "Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." Cabana v. Bullock, 474 U.S.

376, 384-385 (1986). In Beck v. Alabama, *supra*, this Court rejected the state's efforts to dismiss as harmless the due process violation caused by the state's statutory prohibition against the jury's consideration of a verdict of guilt to a lesser included non-capital offense when the defendant is tried for the capital crime of robbery murder. 447 U.S. at 643-664. Just as Beck inferred that the judge reviewing a capital sentence would ordinarily be motivated to follow the jury's verdict, here the risk of an improper verdict because of the unavailability of a lesser included offense option is not compensated when the appellate court purports to find the error harmless by resorting to conjecture about juror thought-processes in finding the defendant death-eligible and imposing the ultimate punishment.²

² The California Supreme Court's decision in this case engaged in unwarranted speculation on both these issues. First, Justice Eagleson stated that "even if the jurors were willing to convict defendant of robbery despite their belief he was guilty only of theft, we cannot imagine they would employ this reluctant verdict to support findings of first degree murder and death eligibility under a robbery-murder special circumstance." 50 Cal.3d at 693, footnote omitted. Not only is this statement inconsistent with that court's recent analysis in Ramkeesoon, 38 Cal.3d at 352, but it is pure sophistry in light of California's special circumstance provisions. Statutory special circumstances are alleged and tried as factual issues during the guilt phase of trial. Pulley v. Harris, 465 U.S. 37, 51-53 (1984). A jury intent on rendering the defendant eligible for life imprisonment without parole would make the same factual finding, as indeed would a jury in any special circumstance case in which the prosecution had not sought the death penalty. Moreover, there is no reason to suppose that given the limited choice of either convicting petitioner of robbery or acquitting him of any offense for stealing the victim's property after brutally knifing him to death, the jury would have reached its verdict "reluctantly" -- especially when faced with the prospect that he be set free based on the mere distinction between before- and after-formed intent and notwithstanding his testimony admitting both the theft and homicide. Cf. Hopper v. Evans, 456 U.S. 605 (1982).

Similarly, the majority's final supposition -- "knowing that a murder in the commission of robbery was the sole basis of defendant's eligibility for the death penalty, they nonetheless actually returned a death verdict," 50 Cal.3d at 693 -- as purporting to provide "one last conclusive indication of their views," *ibid.*, represents appellate factfinding gone haywire. Surely the majority would not suggest that, had

(continued...)

The California Supreme Court's resort to expansive and speculative appellate factfinding is constitutionally flawed. While it does not violate the Eighth Amendment for an appellate court to itself reweigh aggravating and mitigating circumstances "in an attempt to salvage the death sentence imposed by a jury," Clemons v. Mississippi, 494 U.S. ___, ___, 108 L.Ed.2d 725, 738 (1990), the decision in petitioner's case rests upon impermissible appellate factfinding on the issues of guilt and innocence. See Cabana v. Bullock, 474 U.S. at 383-387. No other federal or state court known to petitioner has sanctioned California's approach to assessing prejudice in this context. Cf. Williams v. Armentrout, 891 F.2d 656, 662-663 (8th Cir. 1989), rehearing en banc ordered Feb. 6, 1990.

Petitioner's convictions of robbery and first degree murder based on that robbery, as well as the robbery-murder special circumstance, do not implicate the professed inability of appellate courts "to fully consider and give effect to the mitigating evidence presented by defendants at the sentencing phase in a capital case," Clemons, 108 L.Ed.2d at 738; instead they more closely track the Fourteenth Amendment concerns raised when an instruction relieves the state of its burden to prove every essential element of the crime charged beyond a reasonable doubt. See Carella v. California, 491 U.S. ___, 105 L.Ed.2d 218, 222 (1989). Furthermore, the

²(...continued)

the verdict instead been life imprisonment without parole, it would reflect an implied determination that the jury did not feel forced to an "all or nothing choice" to convict, rather than the far more likely conclusion that death simply was not the appropriate punishment. And in view of the prosecutor's repeated emphasis in arguing for death upon the brutal facts of the homicidal assault, RT 1849-1850, 1863, it is sheer speculation to assume that the timing of petitioner's intent to steal (upon which the demarcation line between robbery and theft rested) played any dispositive role in the jury's sentencing decision.

California Supreme Court's analysis is inconsistent with this Court's recognition that, in circumstances such as petitioner's case, the failure to give the jury the so-called "'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." Beck v. Alabama, 447 U.S. at 637.

In his recent concurring opinion in Carella, supra, Justice Scalia (joined by Justices Brennan, Marshall and Blackmun) questioned the application of normal harmless-error analysis governed by Rose v. Clark, 478 U.S. 570 (1978), in the case of two kinds of instructional defects: those which either create a conclusive presumption or misdescribe an element of the offense. As to both, Justice Scalia perceived a danger that a finding of harmless error by the appellate court will supplant the role of the factfinder, thereby allowing a reviewing court to cure an instructional defect by a finding of fact "made by judges, not a jury." 105 L.Ed.2d at 224. According to Justice Scalia, "As with a directed verdict 'the error in such a case is that the wrong entity judged the defendant guilty.'" Ibid., quoting Rose v. Clark at 578.

As with an instruction tainted by misdescription of an element of the charged offense, the failure to provide petitioner's jury with the option of returning lesser offense verdicts on the charges of robbery and murder should not be "curable" even by "overwhelming record evidence of guilt." Carella, 105 L.Ed.2d at 225, citing Carpenters v. United States, 330 U.S. 395, 408-409 (1947). The wrong tribunal in this case was the California Supreme Court; it substituted its assessment of the evidence for that of the jury, and essentially deprived the factfinder of its option to return a guilty verdict of lesser included offenses. And much like Beck, had the jury been empowered to find petitioner guilty of a lesser, noncapital offense, neither the

jury nor the judge would have had "the opportunity to impose the death sentence." 447 U.S. at 645. For the California Supreme Court to substitute its determination of facts under the guise of harmless-error analysis in this context was to cross the line between permissible appellate factfinding in review of a sentence of death and impermissible appellate reweighing of evidence as to the defendant's guilt or innocence. Cabana v. Bullock, 474 U.S. at 383-387.

Accordingly, this court should grant petitioner's petition for writ of certiorari to examine whether it was constitutional error on the part of the majority of the California Supreme Court to attempt to remedy the prejudicial effect of an instructional omission governed by Beck, and bearing on petitioner's guilt or innocence, by appellate factfinding that consisted of "frail conjecture," Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), which extended to speculating about the jury's determination of the guilt and special circumstance issues.

THE CALIFORNIA SUPREME COURT'S RELIANCE ON THE HOLDING OF PULLEY V. HARRIS, 465 U.S. 37 (1984) THAT COMPARATIVE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED, IN DENYING PETITIONER AN OPPORTUNITY TO DEMONSTRATE THAT HIS DEATH SENTENCE WAS DISPROPORTIONATE, VIOLATED PETITIONER'S EIGHTH AMENDMENT RIGHT TO A MEANINGFUL APPELLATE REVIEW NECESSARY TO SAFEGUARD AGAINST ARBITRARY AND CAPRICIOUS IMPOSITION OF CAPITAL PUNISHMENT

The California Supreme Court acknowledged petitioner's presentation of "an elaborate survey of published Court of Appeal decisions to demonstrate the hypothesis that many first degree murders of equal or greater culpability have received sentences less than death." 50 Cal.3d at 718. But taking its cue from California decisional progeny of Pulley v. Harris, 465 U.S. 37 (1984), it refused to consider whether petitioner thereby established the disproportionality of capital punishment in his case. The court offered only this cursory explanation: "Comparative proportionality review is not constitutionally required, and we have consistently declined to undertake it." Turner at 718.

Petitioner respectfully suggests this off-hand dismissal of his demonstration reflects a fundamental misunderstanding of this Court's Eighth Amendment jurisprudence. The California Supreme Court has incorrectly turned the Harris case on its head in order to foreclose comparative sentencing review in all

capital cases even when it is initiated and presented -- and its thesis is conclusively established -- by the defendant's own evidence, as it was here.

Oblivious to this Court's recognition that "[a]ny barrier" to the sentencer's consideration of mitigating evidence in capital cases must "fall" under compulsion of the Eighth Amendment, McKoy v. North Carolina, 494 U.S. ___, ___, 108 L.Ed.2d 369, 380 (1990), the California Supreme Court has chosen to deprive capital defendants of the means to prove their sentence is disproportionate by resorting to this Court's conclusion that California's capital punishment statute was not unconstitutional "because it failed to require the California Supreme Court to compare Harris' sentence with the sentences imposed in similar capital cases and thereby to determine whether they were proportionate." Pulley v. Harris, *supra*, 465 U.S. at 39-40 (emphasis added). See, e.g., People v. Hamilton, 46 Cal.3d 123, 158 [249 Cal.Rptr. 320, 756 P.2d 1348] (1988) ("the United States Constitution does not require such review" [citing Harris]); People v. Adcox, 47 Cal.3d 207, 274 [253 Cal.Rptr. 55, 763 P.2d 906] (1988) ("It is settled that the Eighth Amendment requires no such comparison"); People v. Stankewitz, 51 Cal.3d 72, 112 [___ Cal.Rptr. ___, ___ P.2d ___] (1990) ("It is well settled that intercase proportionality review is not mandated"). In thus reading Harris as barring California courts from engaging in proportionality review upon a proper showing, the California Supreme Court has lost sight of this Court's teaching that "It is the ultimate duty of courts to determine on a case-by-case basis whether these [capital punishment] laws are applied consistently with the Constitution." McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

When Pulley v. Harris is read in context, the California Supreme Court's misreading of that decision becomes plain. In that case this Court reviewed the

determination by the United States Court of Appeals (on Harris's application for post-appeal habeas corpus) that California's death penalty statute of 1977 was unconstitutional because of various asserted flaws, among which was the failure to mandate proportionality review by the California Supreme Court. See Harris v. Pulley, 692 F.2d 1189, 1192-1197 (9th Cir. 1982). The Ninth Circuit concluded that the California Supreme Court was required to undertake "the determination of whether the penalty of this case is proportionate to other sentences imposed for similar crimes." Id. at 1196. Thus, had this Court not held otherwise in Pulley v. Harris, the Ninth Circuit's Harris decision would have required the Supreme Court of California to collect similar cases and compare them with Harris's offense. But as former Chief Justice Bird had previously emphasized, "It also bears noting that this court is not presently equipped to perform meaningful proportionality review." People v. Jackson, 28 Cal.3d 264, 362 [168 Cal.Rptr. 603, 618 P.2d 149] (1980) (dis. opn.). This Court's Harris decision cited the majority opinions in Jackson, supra, and People v. Frierson, 25 Cal.3d 142 [158 Cal.Rptr. 281, 599 P.2d 587] (1979), in which the California Supreme Court first rejected constitutional challenges to the lack of an express provision for proportionality review in the death penalty statute, "so long as there is an assurance that the death penalty will be applied in a reasonably consistent manner." Frierson at 182. Nevertheless, in the present case, the California Supreme Court has answered petitioner's assertion that his "elaborate survey" demonstrates "that many first degree murderers of equal or greater culpability have received sentences less than death," 50 Cal.3d at 718, by holding simply that "[c]omparative proportionality review is not constitutionally required," ibid.

Such reasoning is both overinclusive and underinclusive. Thus, in

rejecting the Ninth Circuit's imposition of a constitutional duty upon the reviewing court to make its own inquiry to support or refute the defendant's claim of disproportionate punishment even though it is based on limited or no supportive argument, see Pulley v. Harris, 465 U.S. at 40, n. 2; see also People v. Bell, 49 Cal.3d 502, 553 [262 Cal.Rptr. 1, 778 P.2d 129] (1989) (defendant offers no persuasive analysis of the facts to support this claim . . .), this Court simply found "no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it." 465 U.S. 50-51; cf. id. at 54 (Stevens, J., conc.). Harris thus placed the responsibility for raising and proving disproportionality with the defendant rather than the court, as it rests with most issues.

Indeed, Justice Stevens understood the Court as not closing the door on the constitutional necessity of "meaningful appellate review" when shown to be essential to "safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges." Harris, 465 U.S. at 59 (conc. opn.). As he explained: "Like the Court, however, I am not persuaded that the particular form of review prescribed by statute in Georgia -- comparative proportionality review -- is the only method by which an appellate court can avoid the danger that the imposition of the death sentence in a particular case, or a particular class of cases, will be so extraordinary as to violate the Eighth Amendment." Ibid. (per Stevens, J.). Accordingly, just because comparative proportionality review is not a mandated component of a constitutionally acceptable capital sentencing system under Harris does not justify the California Supreme Court's abdication of any role in reviewing a defendant's claim of unconstitutional disproportionality in his or her sentence when

based upon a sufficient showing in the individual case.

The California Supreme Court's own decisions applying Harris suggest an inconsistent, even schizophrenic, approach. Its initial analysis in Frierson, *supra*, 25 Cal.3d 142, which became the lodestar for all subsequent decisions, merely concluded that "the lack of any express provision for proportionality review is not fatal to the validity of a death penalty statute." *Id.* at 181. Significantly Frierson took note of the decisions of other states "which also fail to provide for any proportionality review," but in which the courts "have stated that they will perform a comparable function." *Id.* at 182. The court then illustrated its willingness to do so by citing past decisions in which it had found a disproportionate penalty based either on the theory of "error" or under its cases in which it was necessary to exercise "a constitutionally derived responsibility to assess the proportionality of a particular punishment in criminal cases generally to assure that justice is dispensed in a reasonably evenhanded manner." Frierson at 182-183.

After reiterating these principles in Jackson, 28 Cal.3d 264, 317, a case like Frierson involving the constitutionality of the 1977 death penalty statute, the California Supreme Court in defendant Harris's appeal declined to reconsider the arguments it had rejected in Frierson and Jackson. People v. Harris, 28 Cal.3d 935, 964 [171 Cal.Rptr. 679, 623 P.2d 240] (1981). When it at last addressed constitutional challenges to the 1978 death penalty initiative (under which petitioner was sentenced), the California Supreme Court merely cited the intervening decision in Pulley v. Harris, noting this Court's conclusion that the 1977 statute "was not invalid because it lacked provision for review of sentence proportionality," People v.

Rodriguez, 42 Cal.3d 730, 778 [230 Cal.Rptr. 667, 726 P.2d 113] (1986),³ and adopted the reasoning of that case and its own holdings in Frierson and Jackson; within two months thereafter, it cited Rodriguez in summarily rejecting the contention that the 1978 law was unconstitutional because it did not "require 'intercase' proportionality review." People v. Allen, 42 Cal.3d 1222, 1285 [323 Cal.Rptr. 849, 729 P.2d 115] (1986).⁴ No subsequent case has performed an in-depth analysis or reconsidered the court's conclusions in Rodriguez and Allen.

All later decisions of the California Supreme Court have taken one of three different forms. Some have simply noted defendant's contention that the court was required to extend proportionality review and rejected the argument without explanation, citing this Court's Harris decision or its own Rodriguez and Allen decisions. See People v. Howard, 44 Cal.3d 375, 446 [243 Cal.Rptr. 842, 749 P.2d 279] (1988); People v. Silva, 45 Cal.3d 604, 642-643 [247 Cal.Rptr. 573, 754 P.2d 1070] (1988); People v. Adcox, *supra*, 47 Cal.3d 207, 274; People v. Carrera, 49 Cal.3d 291, 346 [261 Cal.Rptr. 348, 777 P.2d 121] (1989); People v. Miller, 50 Cal.3d 954, 1010 [269 Cal.Rptr. 462, 790 P.2d 289] (1990). A smaller number of

³ Although this Court limited its holding to the 1977 statute, it described the subsequent replacement of those provisions by the 1978 law as "substantially similar," adding that "[f]or the most part . . . what is said applies equally to the current California statute." 465 U.S. at 38, n. 1. In California v. Brown, 479 U.S. 538, 540, n. * (1987), the Court again noted its approval of the statutory scheme.

⁴ Dissenting on this point, Chief Justice Bird in Allen would have held that comparative review of death sentences should be required under state equal protection principles because that right had been extended by statute to "common felons". 42 Cal.3d at 1290-1309. Ironically, she added: "By holding that there is no credible basis for concluding that appellant's sentence is disproportionate -- at least insofar as that term has been elucidated in past decisions of this court -- the majority implicitly recognize that some form of proportionality review is required for capitally condemned individuals." *Id.* at 1291.

cases has followed the same route but expanded the discussion slightly by intimating a different conclusion was possible but for defendant's inadequate showing. See People v. Hamilton, *supra*, 46 Cal.3d 123, 158 ("because the United States Constitution does not require such review [citing Pulley v. Harris] and defendant fails to set forth compelling reasons or authority in support, we decline his request"); People v. Allison, 48 Cal.3d 879, 912-913 [258 Cal.Rptr. 208, 771 P.2d 1294] (1989) (rejecting proportionality review because defendant "offers no analysis . . . of the facts supportive of such argument"); People v. Andrews, 49 Cal.3d 200, 234 [260 Cal.Rptr. 583, 776 P.2d 285] (1989) (accord); People v. Bell, *supra*, 49 Cal.3d 502, 553 (1989) (accord). Finally, in one case antedating petitioner's, the court acknowledged defendant's reference "to other published appellate cases in which assertedly more 'aggravated' offenses nonetheless resulted in mere life sentences," People v. Sheldon, 48 Cal.3d 935, 960 [258 Cal.Rptr. 242, 771 P.2d 1330] (1989), but after considering mitigating circumstances pertaining to the defendant and the aberrational circumstances surrounding the crime concluded nonetheless that the death penalty was not disproportionate punishment for his offense. *Ibid.*

The foregoing survey graphically illustrates that, with few isolated exceptions, the California Supreme Court has abdicated any role in ensuring meaningful appellate review as "an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges." Pulley v. Harris, 465 U.S. at 59 (Stevens, J., conc.). It is one thing for a state appellate court to decline the requests of most capital defendants that it undertake *sua sponte* intercase proportionality review of every death judgment; it is quite another to read Harris as absolutely foreclosing a substantial and undisputed demonstration, supported

by citation to comparable cases and appropriate analysis, that imposition of the death penalty is disproportionate under the Eighth Amendment in this specific instance.

The distinction between adjudication based on data presented to a court through appropriate documentation and argument, and a court's own performance of such a task, is well illustrated by McCleskey v. Kemp, *supra*, 481 U.S. 279. There, this Court reviewed a defendant's claim of "disparity in the imposition of the death sentence in Georgia" based on asserted racial factors. *Id.* at 286. McCleskey, like petitioner herein, did not assert -- contrary to such California defendants as Frierson, Jackson and Harris in their appeals to the California Supreme Court -- that the Constitution placed the onus on the reviewing court to make its own inquiry to support or refute its contention based on some limited information. Cf. People v. Bell, 49 Cal.3d at 553 (defendant "offers no persuasive analysis of the facts to support this claim . . ."). Instead, McCleskey presented "two sophisticated statistical studies" to support his Eighth Amendment contention. McCleskey, 481 U.S. at 286. While a bare majority of the Court determined that his showing was inadequate to support the claim, the Court did adjudicate that claim -- on its merits -- based on the data presented by McCleskey.

Like McCleskey, petitioner has offered detailed evidence and extensive analysis (albeit of a different kind) to establish that his death sentence is disparate and arbitrary for Eighth Amendment purposes. That claim unquestionably is a substantial one. It relates directly to the basic premise underlying the death penalty's constitutionality, as applied to his case, by ensuring the evenhanded, rational and consistent imposition of capital punishment in California. Jurek v. Texas, 428 U.S. 262, 276 (1976). Petitioner submits that the Constitution does not justify the

California Supreme Court's rigid reliance upon Harris and its progeny as a sufficient basis to abrogate its responsibility to afford him a vehicle for meaningful review and adjudication of his constitutional-disproportionality claim.

In Gregg v. Georgia, 428 U.S. 153 (1976), Justice Stewart took note of the holding in Furman v. Georgia, 408 U.S. 238 (1972), that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg at 188. Focusing on Furman's requirement of a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," 408 U.S. at 313, the Gregg plurality opinion reasoned,

"Indeed, the death sentences examined by the Court in Furman were 'cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wrongfully and freakishly imposed.'" 428 U.S. at 188, quoting Furman, supra (conc. opn. of Stewart, J.).

The materials petitioner supplied to the California Supreme Court plainly were relevant to the concerns of Furman as reiterated in Gregg, by focusing on establishing that the punishment of death for the offense committed by petitioner is "arbitrary and capricious." Petitioner's elaborate and systematic study demonstrated that in many, many cases, death-eligible defendants in California have received sentences less than death for crimes of comparable and often far more aggravated nature and culpability than petitioner's. The survey thus proved that which the Eighth

Amendment directly forbids: In being selected by Merced County to be put to death for this particular murder, petitioner's case was comparable to "being struck by lightning." No less than the defendant in McCleskey v. Kemp, petitioner was entitled to have his kindred claim adjudged on its merits.

The California Supreme Court reached its high water mark in its application of the principles articulated in Furman and Gregg when it expressed in Frierson, "our awareness of a constitutionally derived responsibility to assess the proportionality of a particular punishment in criminal cases generally to assure that justice is dispensed in a reasonably evenhanded manner." 25 Cal.3d at 183. But its subsequent decisions, emboldened by Pulley v. Harris -- although nearly every case citing that decision has misunderstood its reach -- have marked a steady, unrelenting retreat from Frierson's initial assurances. While Harris may justify the summary conclusion in the instant case that comparative proportionality review "is not constitutionally required," 50 Cal.3d at 718, it does not support that court's further determination -- "and we have consistently declined to undertake it," ibid. -- under any Eighth Amendment principle thus far articulated by this Court. Indeed, the California Supreme Court has forgotten that "It is the ultimate duty of courts to determine on a case-by-case basis whether these [capital punishment] laws are applied consistently with the Constitution." McCleskey, 481 U.S. at 319.

To the extent that the California Supreme Court continues to utilize Harris to deny all defendants including this petitioner meaningful appellate review on the issue of proportionality, despite the strongest showing possible (and that court has never disputed the substance of petitioner's showing), it engages in constitutional overkill that should no longer be countenanced. Review of the present case is thus

necessary to clarify the proper scope of Harris so as to disabuse the California Supreme Court of its view that it may refuse to adjudicate a defendant's plausible claim that capital punishment has been imposed in an arbitrary or capricious manner in his case, when it is substantiated by a comparison of other cases that reflect an unconstitutional sentence disparity.

But in the event this Court or some of its Justices believe that the decision below must be sustained under compulsion of Harris, it is time to modify or overrule that decision in cases like this one. When -- as here -- a defendant overcomes the usual presumption that state statutory sentencing procedures which "focus discretion 'on the particularized nature of the crime and the particularized characteristics of the individual defendant,'" McCleskey, 481 U.S. at 308, quoting Gregg, 428 U.S. at 206, ensure that the death sentence has not been "wantonly and freakishly imposed," Id. at 207,⁵ the Eighth Amendment is offended by California's strict, inflexible prohibition against proportionality review sought by one ready and able to prove his thesis. Absent clarification, modification or disapproval of Harris, it is simply not possible to state with confidence that California's capital sentencing procedure has steered clear from "the danger that the imposition of the death sentence in a particular case, or a particular class of cases, will be so extraordinary

⁵ In Walton v. Arizona, 497 U.S. ___, 111 L.Ed.2d 511 (1990), decided last Term, the Court declined to overturn the Arizona Supreme Court's determination that the state's heinous, cruel or depraved aggravating circumstance did not unconstitutionally fail to channel sentencing discretion. 111 L.Ed.2d at 527-530. As in the McCleskey and Harris cases that preceded it, Walton held only that "proportionality review is not constitutionally required . . ." Id. at 530. Furthermore, the Court there observed that the Arizona Supreme Court had undertaken proportionality review in good faith and found that Walton's sentence "was proportional to the sentences imposed in cases similar to his." Ibid.

as to violate the Eighth Amendment." Harris, at 59 (Stevens, J., conc.).

This Court should accordingly grant certiorari to address this important and recurring question, and reverse petitioner's death sentence in order that the California Supreme Court can adjudicate the merits of his demonstration that the sentence of death in his case is unconstitutional.

III

THE PROSECUTOR'S ARGUMENT THAT THE JURY SHOULD CONSIDER THE ABSENCE OF STATUTORY MITIGATING FACTORS AS CIRCUMSTANCES AGGRAVATING THE PENALTY DETERMINATION VIOLATED THE PRINCIPLE OF GUIDED DISCRETION REQUIRED BY THE EIGHTH AMENDMENT

The record of petitioner's trial reflects that on no less than three occasions, the prosecutor argued to petitioner's jury that the absence of evidence with respect to the statutorily enumerated mitigating factors should be weighed on the penalty scale as circumstances in aggravation. 50 Cal.3d at 714. Although the California Supreme Court had previously held it improper for a prosecutor to argue that the mere absence of evidence of a statutory factor was itself an aggravating circumstance, People v. Davenport, 41 Cal.3d 237, 289-290 [221 Cal.Rptr. 794, 710 P.2d 861] (1985), its opinion quickly rejected petitioner's claim. The court explained that it "'assumed reasonable jurors would understand how to evaluate the absence of particular mitigating factors,'" Turner at 714, citing People v. Hamilton, 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701, 774 P.2d 730] (1989), and further observed that "[s]uch jurors are unlikely to give substantial aggravating weight to the absence of

obviously mitigating factors, such as victim participation or consent, belief in moral justification, or extreme duress or domination, which are rarely present in capital homicides." Ibid.

Recently in Boyde v. California, 494 U.S. ___, 108 L.Ed.2d 326, (1990), this Court found no reasonable likelihood that the jurors understood the instructions as precluding consideration of relevant mitigating evidence offered by the defendant. In response to the defendant's suggestion that misleading argument by the prosecution may have reinforced an impermissible interpretation of the mitigating factor at issue, the Court observed that "prosecutorial misrepresentations . . . are not to be judged as having the same force as an instruction from the court." 108 L.Ed.2d at 332. In petitioner's case, by contrast, the instructions -- also pursuant to Cal. Penal Code § 190.3 -- neither identified the factors as specifically aggravating or mitigating, nor was the jury otherwise instructed that the absence of mitigating factors was deemed in law to be mitigating or even neutral. Petitioner urges that under these circumstances Boyde's "reasonable likelihood" test is satisfied; in "the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence," Penry v. Lynaugh, 492 U.S. ___, ___, 106 L.Ed.2d 256, ___ (1989), the prosecutor's argument unconstitutionally channeled and misled the jury in its consideration of all relevant mitigating evidence. Cf. Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981) ("the jury must receive clear instructions which not only do not preclude consideration of mitigating factors . . . but which also guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . ."); see also Goodwin v. Balkcom, 684 F.2d 794, 800-803 (11th Cir. 1982); Bell v. Watkins, 692 F.2d 999, 1011-1012 (5th. Cir.

1982).

Here, after urging a statutorily unlisted factor as an aggravating circumstance,⁶ the prosecutor advanced a series of factors concerning the absence of mitigation that he equated with aggravation. First he turned to the factor "whether or not the victim was a participant in the Defendant's homicidal conduct or consented to the homicidal act." RT 1849:5-7. The prosecutor argued that this inquiry must be answered in the negative and thereby established a second aggravating factor. RT 1849:10-16.

Continuing this foray into the refuting of mitigation factors, he urged:

"Another aggravating factor is whether or not the offense was committed under circumstances that the defendant reasonably believed to be moral justification or extenuation of his conduct." RT 1849:17-20; emphasis supplied.

Since the offense was not committed under such circumstances, this too counted on the side of aggravation in his view. RT 1849:21-1850:12.

The prosecutor went on in this vein:

"Another factor that you're to consider is whether or not the defendant acted under extreme duress or under the substantial domination of another person. Obviously not. There was no other person around. [¶] There was no one else urging him to do the thing he did. No one urging him to take the T.V., the stereo or anything of that sort. No one urging him to sink that knife into the victim 40, 45 times. That is an -- obviously an aggravating factor which you could -- should consider. RT 1850:13-21.

The prosecutor concluded by maintaining there was no way to know

⁶ The California Supreme Court has interpreted California Penal Code section 190.3 as limiting the jury's consideration of aggravating factors to those specifically enumerated in that statute, and declared that "matters not within the statutory list are not entitled to any weight in the penalty determination." People v. Boyd, 38 Cal.3d 762, 773 [215 Cal.Rptr. 1, 700 P.2d 782] (1985).

whether petitioner was under the influence of drugs or otherwise intoxicated, referring to the circumstances of the offense, and insisting that petitioner was not entitled to sympathy from the jury because he had shown none for his victim. RT 1850-1852.

In its opinion, the California Supreme Court stated:

"Defendant correctly notes that the prosecutor thrice improperly referred to the absence of a mitigating factor as aggravating. . . According to the prosecutor, if the jury believed that Savage was not a participant in his own homicide (see [Cal. Pen. Code] §190.3, subd. (e)), that defendant had no belief in moral justification for the killing (id., subd. (f)), and that defendant did not kill under extreme duress or domination (id., subd. (g)), those were circumstances in aggravation." 50 Cal.3d at 714.

Nevertheless, the court explained that it had "consistently declined to deem such improper argument a basis for reversal of a death judgment." Turner at 714. And in this case (1) petitioner's jury "was instructed to consider a particular sentencing factor only 'if applicable,'" ibid., and (2) "the jurors were not misled about their discretion and responsibility to determine the appropriate penalty under all the evidence." ibid.

These superficial explanations appear to be inconsistent with the recognition in McCleskey v. Kemp, 481 U.S. 279, 314, n. 37: "It would be improper and often prejudicial to allow jurors to speculate as to aggravating circumstances wholly without support in the evidence." And contrary to the California Supreme Court's general view, petitioner's jurors were reasonably likely to give substantial weight to both the victim's participation and the defendant's substantial domination; both were issues in this case, and the absence of such factors would be significant to the jury. Finally, the court's reliance upon its earlier rejection of petitioner's additional contention that the jury was misled as to its sentencing responsibilities by

the prosecutor's emphasis upon the statute's "mechanical and mandatory language," 50 Cal.3d at 710-712, was erroneous. Rather than indicating the jurors were not misled about their sentencing discretion, the repeated references to the absence of mitigating factors as being properly weighed in aggravation only heightened the probable unreliability of the penalty determination.

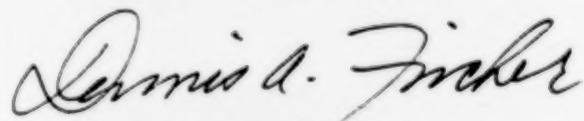
In Zant v. Stephens, 462 U.S. 862, (1983), this Court stated that a statute would violate the defendant's right to due process of law if it "[a]ttached the 'aggravating' label to . . . conduct that actually should militate in favor of a lesser penalty" Id. at 885. When the jury receives an undifferentiated list of sentencing factors, without further guidance as to the aggravating or mitigating aspect of the relevant circumstances that guide its penalty determination, a defendant is exposed to the risk of an arbitrary and capricious sentencing process. Indeed, as the California Supreme Court recognized with respect to the very mitigating factors at issue, "to permit consideration of the absence of those factors as aggravating circumstances would make these aggravating circumstances automatically applicable to most murders." People v. Davenport, 41 Cal.3d at 289. Thus, this court should grant certiorari to review whether constitutional error occurs when, as in petitioner's case, the prosecutor's misleading argument reinforces a constitutionally objectionable interpretation of the jury's sentencing responsibilities that is not cured -- and indeed is exacerbated -- by the judge's instructions.

CONCLUSION

For each and all of the reasons stated above, the petition for writ of certiorari should be granted to resolve these important and unsettled questions.

DATED: October 19, 1990

Respectfully submitted,

A handwritten signature in cursive script, reading "Dennis A. Fischer".

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APPENDIX A

OPINION OF THE SUPREME COURT OF CALIFORNIA
(50 Cal.3d 668)

[No. S004658. Apr. 26, 1990.]

THE PEOPLE, Plaintiff and Respondent, v.
THADDEUS LOUIS TURNER, Defendant and Appellant.

SUMMARY

Defendant was charged with first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). Defendant based his defense on the theory that the killing, which occurred in the victim's home, was provoked by the victim's sudden, violent sexual advances. He was found guilty of both offenses, the special circumstance was found true, and he was sentenced to death. (Superior Court of Merced County, No. 11945, Donald R. Fretz, Judge.)

The Supreme Court affirmed. It held that defendant's convictions were supported by sufficient evidence, notwithstanding defendant's contention that there was no indication that he formed an intent to steal from the victim before attacking and killing him. The court held that when one kills another and takes substantial property, it is ordinarily reasonable to presume that the killing was for purposes of robbery. The court also held that the trial court's error in failing to provide instructions and verdict forms that would permit convictions and findings based on theft rather than robbery was harmless, since the jury was given other instructions making clear beyond doubt that defendant was not guilty of robbery, first-degree felony murder, or the sole special circumstance charged, if his intent to steal arose only after the fatal assault. The trial court did not err in failing to make a preliminary ruling on the question of law whether defendant's conduct following the killing amounted to a guilty flight and by leaving its resolution to the jury. Further, the court held, there was no error or prejudice resulting from the instructions the trial court gave regarding the testimony of a single witness and false-in-part testimony. The trial court did not err in ordering the jury to resume its deliberations on the robbery count when it returned for the penalty phase of trial, after it was found that the jury had failed to sign and return a verdict on that count. The court held further that the absence of a trial court ruling on whether defendant's prior convictions for robbery and receiving stolen property should be admitted under Evid.

Code, § 352 (probative value of evidence weighed against potential for unfair prejudice), was harmless.

In the penalty phase of the trial, the court held, defendant suffered no reversible prejudice, to the extent the claim was cognizable on appeal, from the trial court's error in failing to exclude aggravating evidence as to which the prosecutor failed to give timely notice under Pen. Code, § 190.3. It was not reversible error for the trial court to instruct the jury that it "shall" impose the death penalty if persuaded that the aggravating factors "outweigh" those in mitigation, or in eliminating Pen. Code, § 190.3, factor (b) (other crimes activity involving violence), from the list of aggravating and mitigating circumstances to be read to the jury. In denying defendant's motion to modify the death verdict under Pen. Code, § 190.4, subd. (e), the trial court did not improperly consider "nonstatutory" aggravating facts by referring to Cal. Rules of Court, Div. III, Sentencing Rules for the Superior Courts. Finally, the court held, defendant's sentence was not disproportionate to his individual culpability. (Opinion by Eagleson, J., with Lucas, C. J., Panelli, J., and Kaufman, J.,* concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

- (1a-1c) **Homicide § 63—Evidence—Sufficiency—First Degree Murder—During Commission of Robbery.**—In a capital prosecution, defendant's convictions of robbery (Pen. Code, § 211), and first degree murder (Pen. Code, §§ 187, 189), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), were supported by sufficient evidence, notwithstanding defendant's contention that there was no indication that he formed an intent to steal from the victim before attacking and killing him. The elements of a robbery-murder special circumstance are not present if the theft was merely incidental to the murder. However, when one kills another and takes substantial property, it is ordinarily reasonable to presume that the killing was for purposes of robbery. Here defendant admitted killing the victim and was in possession of the victim's property when arrested two days later. The jury was not compelled to credit defense speculation, based only on defendant's implausible testimony, that

* Retired Associate Justice of the Supreme Court sitting under assignment by the Acting Chairperson of the Judicial Council.

after the killing someone else entered the victim's home, cut the victim's telephone cords, stole the missing property, and moved and recovered the body.

- (2) **Robbery § 3—Elements of Offense—Intent—Where Intent Arises After Use of Force.**—When the intent to steal arises only after force is used, the offense is theft, not robbery.
- (3) **Homicide § 63—Evidence—Sufficiency—First Degree Murder—Premeditation—Brutality of Killing.**—The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random explosion of violence as with calculated murder. However, brutality can be indicative of calculated violence in context, particularly where the brutality itself contradicts the defendant's version of events, and other evidence also supports a theory of premeditation for criminal purposes.

[Homicide: presumption of deliberation or premeditation from the circumstances attending the killing, note, 96 A.L.R.2d 1435. See also Am.Jur.2d, Homicide, § 266.]

- (4a-4c) **Homicide § 85—Instructions—Grades and Degrees of Offense—Felony Murder—Murder During Commission of Robbery—Lesser Included Offenses.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), the trial court erred in failing to provide instructions and verdict forms that would permit convictions and findings based on theft rather than robbery, where, though less than convincing, defendant's testimony that he killed in response to the victim's homosexual advances and only thereafter decided to take property, was substantial evidence that he did not steal by means of force or fear. However, the error was harmless, since the jury was given other instructions making clear beyond doubt that defendant was not guilty of robbery, first degree felony murder, or the sole special circumstance charged, if his intent to steal arose only after the fatal assault.

- (5) **Robbery § 3—Elements of Offense—Theft as Lesser Included Offense.**—Theft is a lesser included offense of robbery; robbery includes the element of force or fear.

- (6a, 6b) **Criminal Law § 678—Appellate Review—Harmless and Reversible Error—Instructions—Included Offenses.**—The court must in-

struct on a lesser included offense, even if not requested to do so, when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. However, the erroneous failure to instruct on a lesser included offense is not prejudicial if it is possible to determine that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.

- (7) **Homicide § 94—Instructions—Circumstantial Evidence.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), it was not prejudicial error for the trial court to refuse to give a basic circumstantial-evidence instruction, where the court did give an instruction advising the jury on how to evaluate circumstantial evidence introduced to prove defendant's specific intent or mental state, and also gave instructions covering circumstantial evidence both generally and with respect to intent or state of mind, in connection with the robbery-murder special-circumstance allegation. Since defendant admitted killing the victim and taking at least some of his property, circumstantial evidence was entirely unnecessary on those issues. The only disputed matter sought to be proved by circumstantial evidence was the specific intent or state of mind with which defendant committed the charged acts, and thus the instructions given covered the ground adequately.

- (8a, 8b) **Homicide § 94—Instructions—Evidence—Guilty Flight.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), the trial court did not err in failing to make a preliminary ruling on the question of law whether defendant's conduct following the killing amounted to a guilty flight and by leaving its resolution to the jury under an instruction stating if there was such flight, the weight such a circumstance was entitled to was a matter for the jury to determine. By explaining to the jury that there was a "departure" from the homicide scene, the meaning of which must be left to the jury, the court implicitly concluded that the circumstances of the "departure" permitted an inference of guilty motive. The instruction allowed the jury to determine from the relevant evidence whether "flight" had been proved. Further, there was no reasonable probability that the flight instruction affected the verdicts: since defendant admitted participation in a bloody slay-

ing, the jury was most likely to infer, as the instruction permitted, that his hasty departure was to be expected regardless of his consciousness of guilt.

- (9) **Criminal Law § 244—Trial—Instructions—Flight.**—A flight instruction is proper whenever evidence of the circumstances of the defendant's departure from the crime scene or his usual environs, or of his escape from custody after arrest, logically permits an inference that his movement was motivated by guilty knowledge.

[See Cal.Jur.3d (Rev), Criminal Law, § 447.]

- (10) **Homicide § 94—Instructions—Evidence—Testimony of Single Witness.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), there was no error or prejudice in the form of instruction given as to the testimony of a single witness. The trial court advised that the credible testimony of a single witness is sufficient proof of any fact but that before finding any fact to be proved by the uncorroborated testimony of a single witness, the jury should carefully review the testimony on which the proof of such fact depended. Defendant contended that the court should have limited the cautionary admonition to the finding of any fact "required to be established by the prosecution." However, the court's instruction was in the exact form of an instruction previously prescribed by the California Supreme Court. Further, when an accused offers his uncorroborated testimony for the purpose of raising a reasonable doubt as to guilt, the jury should weigh such evidence with the same caution it accords similarly uncorroborated testimony by a prosecution witness. Although the instruction given could be susceptible of the interpretation that the defense, like the prosecution, has the burden of proving facts, here the jury was instructed at length that the People must prove all elements of each charged offense beyond a reasonable doubt.

- (11) **Homicide § 94—Instructions—Evidence—False-in-part Testimony.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), there was no error or prejudice arising from the trial court's instruction on false-in-part testimony (a witness willfully false in one material part of his testimony is to be distrusted in others; the whole

testimony of such a witness should be rejected unless the probability of truth favors his testimony in other particulars). Defendant contended that the instruction was improper because it singled out his testimony alone for suspicion, thus lessening the prosecution's burden (the circumstantial evidence presented by the prosecution witnesses was not disputed), and because there was no evidence that he told any material willful falsehood. The instruction was neutrally phrased and did not focus attention on a particular witness. Since there were many instances of implausibility in defendant's testimony, there was ample evidence upon which to base such an instruction.

- (12) **Homicide § 98—Verdict—Resumption of Deliberations Where Jury Failed to Sign and Return Verdict as to One Charge.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), the trial court did not err in ordering the jury to resume its deliberations on the robbery count when it returned for the penalty phase of trial. The jury, having indicated a verdict of guilty of first degree murder and a true finding on the special circumstance, failed to sign and return a verdict on the robbery charge, and the jury foreman insisted in open court that the jury had reached a decision on the robbery count but had understood that if they found the murder and special circumstance charges true, they did not have to return a verdict form on the robbery charge. The jurors in a capital case are neither "discharged," nor beyond the court's control, once they have completed guilt phase deliberations. Defendant contended that the jury should have been told to begin the robbery deliberations "anew," but they were told to "resume deliberations" and nothing in the exchange between the court and the foreman could be construed as the court's agreement that no further deliberations were necessary.
- (13) **Criminal Law § 571—Appellate Review—Presenting and Reserving Objections—Evidence at Trial—Other Offenses or Misconduct—Effect of Change of Law Following Trial.**—On appeal of convictions of first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), defendant's contention that his prior convictions should not have been admitted for purposes of impeachment could be addressed, even though evidentiary challenges are usually waived unless timely raised in the trial court, and here defense counsel failed to do so. An exception is applicable when the pertinent

law later changes so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. At the time of defendant's trial, it was widely assumed that Cal. Const., art. I, § 28, subd. (f), eliminated all restrictions on the admissibility of prior felony convictions for purposes of impeachment. Following defendant's trial, the California Supreme Court rejected the overwhelming weight of appellate authority and consciously declined to accept the apparent plain meaning of the constitutional language, when it held that the subdivision did not eliminate the trial court's power and duty under Evid. Code, § 352, to weigh the probative value of prior convictions offered for impeachment against the potential for unfair prejudice.

- (14) **Homicide § 108—Appeal—Harmless Error—Admission of Evidence—Prior Convictions—Where Trial Court Failed to Weigh Probative Value Against Prejudice.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), the absence of a trial court ruling on whether defendant's prior convictions for robbery and receiving stolen property should be admitted under Evid. Code, § 352 (probative value of evidence weighed against potential for unfair prejudice), was harmless. At the time defendant was tried, it was assumed that Cal. Const., art. I, § 28, subd. (f), eliminated all restrictions on the admissibility of prior felony convictions for purposes of impeachment. Subsequently the California Supreme Court ruled that the trial court retains its discretion under § 352 to admit or exclude such evidence. Both robbery and receiving stolen property necessarily involve moral turpitude, and the trial court would have had authority either to admit or exclude them. However, even though the prior convictions presented some potential for prejudice, the valid evidence, both direct and circumstantial, that defendant was guilty of robbery and murder was compelling, and thus it was not reasonably probable that admission of the convictions altered the outcome.

- (15) **Homicide § 108—Appeal—Harmless Error—Admission of Evidence—Photographs and Testimony Relating to Victim's Body.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), the trial court did not commit reversible error by admitting, at the guilt phase, a videotape depicting the crime scene and the victim's body as initially encountered by the police and, at the penalty phase, testimony by the

autopsy physician and related autopsy photographs. Defendant waived these issues on direct appeal by failing to object at trial to introduction of the challenged evidence. Further, he could not claim on appeal that counsel's failure to object constituted ineffective assistance, since the appellate record did not affirmatively disclose that counsel acted from ignorance or mistake, and there were plausible reasons why competent counsel would not oppose admission of the tape, testimony, and photographs. In any event, the evidence was neither irrelevant nor cumulative, since the two divergent theories of how the homicide occurred depended for support on details of physical and circumstantial evidence. The evidence was not unduly gruesome or inflammatory.

- (16a, 16b) **Homicide § 108—Appeal—Harmless Error—Admission of Evidence—Penalty Phase—Aggravating Evidence—Where Timely Notice Not Given.**—In the penalty phase of a prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), defendant suffered no reversible prejudice, to the extent the claim was cognizable on appeal, from the trial court's failure to exclude aggravating evidence as to which the prosecutor failed to give timely notice under Pen. Code, § 190.3. Defendant never raised any specific notice objection in the trial court as to testimony by the autopsy physician and photographs demonstrating the great force with which the knife blows were delivered to the victim's body, and he did not timely object to that evidence or to evidence of his previous crimes. He objected *in limine*, but *in limine* rulings on evidence are subject to reconsideration upon full information at trial, and evidentiary objections must be renewed at such time as the evidence is actually offered. The record indicated no prejudice arising from the timing of the prior-crimes notice, and defendant made no appellate claim that he was actually hampered by late notice as to the autopsy testimony and photographs.

- (17) **Homicide § 107—Appeal—Harmless Error—Penalty Phase—State-law Error.**—State-law error at the penalty phase of a capital trial is harmless if there is no reasonable possibility that the error affected the penalty verdict.
- (18) **Homicide § 110—Appeal—Harmless Error—Instructions—Penalty Phase—Mandatory Nature of Sentencing Process.**—In the penalty phase of a prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance

that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), it was not reversible error for the trial court to instruct the jury that it "shall" impose the death penalty if persuaded that the aggravating factors "outweigh" those in mitigation. There was no possibility that the jury would have been misled into making the mandatory or mechanical penalty determination. The court instructed that any evidence of an aggravating factor was to be disregarded unless the jury unanimously found it true beyond a reasonable doubt, and that it could consider any other aspect of defendant's character or record that defendant offered as a basis for a sentence less than death. Further, the prosecutor made clear that the jury was to arrive at the "appropriate" penalty by "weighing" the aggravating and mitigating factors in light of their own consciences, and defense counsel's argument reinforced the notion that the penalty determination was normative and subjective.

- (19) **Homicide § 110—Appeal—Harmless Error—Instructions—Penalty Phase—Elimination of Other Crimes Factor.**—In the penalty phase of a prosecution for first degree murder and robbery, the trial court's elimination of Pen. Code, § 190.3, factor (b) (other crimes activity involving violence), from the list of aggravating and mitigating circumstances to be read to the jury, thus leaving Pen. Code, § 190.3, subd. (c) (prior felony convictions), as the only instructional reference to defendant's other crimes, did not constitute prejudicial error. Defendant contended that the elimination of factor (b) prevented the jury from realizing that his lack of other violent crimes was a mitigating factor. Any "error" was invited by defendant himself, since defense counsel submitted the instruction in the form finally given. Defense counsel's tactical purpose was obvious: only defendant's bare reference to a prior robbery conviction had been allowed in evidence, and counsel sought to confine the jury's consideration of this incident accordingly. Counsel's tactic had the desired result. The prior robbery was in fact a violent crime within the meaning of factor (b), and had a reference to that factor being included in the instruction, the prosecutor would most likely have so argued.
- (20) **Homicide § 101—Punishment—Death Penalty—Argument of Prosecutor—Length of Time Between Previous Incarceration and Present Offense.**—In the penalty phase of a prosecution for first degree murder and robbery, there was no impropriety in the prosecutor's assertions that defendant was incarcerated for each of his prior felony offenses and that he committed the present offenses within months after his most recent release. Neither prior "prison sentences," nor the

time between release from prison and new criminal conduct are statutorily listed aggravating factors. However, the prosecutor did not state that defendant's self-admitted prior incarcerations were independent aggravating factors; he simply noted, as one of the circumstances of the current crime under Pen. Code, § 190.3, factor (a), that the murder of the victim occurred soon after defendant's release from felony incarceration. The prosecutor may broadly argue all reasonable inferences from statutorily admissible aggravating evidence. The suggestion that the current homicide took place under circumstances indicating defendant's unwillingness to learn from prior punishment was entirely proper.

- (21) **Homicide § 107—Appeal—Harmless Error—Penalty Phase—Argument of Prosecutor—Reference to Absence of Mitigating Factor as Aggravating.**—In the penalty phase of a prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), the prosecutor's improper reference to the absence of a mitigating factor as aggravating did not constitute reversible error, where the jury was instructed to consider a particular sentencing factor only if applicable, and where the jurors were not misled about their discretion and responsibility to determine the appropriate penalty under all the evidence. The jury was confronted with a particularly savage murder, committed for purposes of robbery against a victim who had befriended defendant and shown him kindness, and defendant had at least two recent prior felony convictions, one embracing violence. In mitigation, defendant showed only that he was loved and considered gentle by family and friends, and had been reliable in recent job performance. There was no reasonable possibility the prosecutor's mischaracterizations affected the penalty verdict.
- (22) **Homicide § 101—Punishment—Death Penalty—Motion for Modification of Sentence—Aggravating and Mitigating Evidence—Consideration of Nonstatutory Aggravating Factors.**—In a capital prosecution for first degree murder and robbery, the trial court, in denying defendant's motion to modify the death verdict under Pen. Code, § 190.4, subd. (e), did not improperly consider "nonstatutory" aggravating factors by referring to Cal. Rules of Court, div. III, Sentencing Rules for the Superior Courts. The court indicated at the outset that it understood that Pen. Code, § 190.3, contains the pertinent sentencing factors. Further, while Pen. Code, § 190.3, subds. (d)-(k), set forth those aspects of the capital offense that the law deems specifically pertinent to the penalty determination, these paragraphs do not limit

the sentencer's power, under Pen. Code, § 190.3, subd. (a), to weigh any other constitutionally permissible aspect of the offense that the sentencer deems pertinent to the appropriate penalty. Thus the trial court simply evaluated the "circumstances" of defendant's capital crime, all of which were validly in evidence, under a normative framework familiar to him from another context, but relevant as well to capital sentencing.

- (23) **Homicide § 101—Punishment—Death Penalty—Motion for Modification of Sentence—Aggravating and Mitigating Evidence—Character and Background Evidence Unrelated to Capital Offense.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), the trial court, in denying defendant's motion to modify the death verdict under Pen. Code, § 190.4, subd. (e), did not ignore constitutionally relevant mitigating evidence of defendant's character and background unrelated to the capital offense. The court failed to mention such evidence in detail on the record. However, the court had previously instructed the jury to weigh such evidence, and at the beginning of its ruling on the motion under Pen. Code, § 190.4, subd. (e), it expressly declared its own obligation to consider it. Further, the court never stated or implied that it deemed such evidence legally irrelevant.
- (24) **Homicide § 101—Punishment—Death Penalty—Motion for Modification of Sentence—Independent Judgment of Court.**—In a capital prosecution for first degree murder (Pen. Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), the trial court, in denying defendant's motion to modify the death verdict under Pen. Code, § 190.4, subd. (e), did not fail to exercise its "independent judgment" about the appropriate penalty. Even assuming the trial court has such a duty under Pen. Code, § 190.4, subd. (e), defendant pointed to no indication that the duty was breached. Read as a whole, the court's comments revealed its personal belief that defendant committed a premeditated robbery-murder against a trusting victim, that aggravation outweighed mitigation, and that the jury's verdict of death was appropriate under all the circumstances.
- (25) **Criminal Law § 519—Punishment—Cruel and Unusual—Death Penalty—Proportionality.**—The death penalty was not a disproportionate penalty for defendant, who was convicted of first degree murder (Pen.

Code, §§ 187, 189) and robbery (Pen. Code, § 211), with the special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). Comparative proportionality review is not constitutionally required, but U.S. Const., 8th Amend., and Cal. Const., art. I, § 17, do preclude the imposition of punishment that is not proportionate to the defendant's individual culpability. Defendant, while a guest in the victim's home, committed a savage, sustained, and murderous knife assault upon his unarmed host. The evidence strongly suggested that defendant planned in advance to rob and personally kill the victim, relying on feigned friendship to win the victim's trust and gain access to his property. Given defendant's calculated brutality in aid of an independent felonious purpose, the death penalty was not disproportionate to defendant's individual culpability.

COUNSEL

Dennis A. Fischer, under appointment by the Supreme Court, Douglas W. Otto and John M. Bishop for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Joel Carey and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

EAGLESON, J.—This is an automatic appeal from a judgment of death. Defendant Thaddeus Louis Turner was found guilty of one count of first degree murder (Pen. Code, §§ 187, 189)¹ and one count of robbery (§ 211); the jury also found true a special circumstance that the murder was committed while defendant was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)(i)). We find no prejudicial error affecting either the guilt or penalty determinations. We will therefore affirm the judgment in full.

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

GUILT TRIAL

A. *Prosecution evidence.*

The victim, Roy Savage, was a middle-aged Black man who taught mathematics at Merced College. He also directed the college's Extended Opportunity Program for disadvantaged youth. After his divorce, and while his daughter was away at college, Savage lived alone.

On Monday, April 16, 1984, Savage's cousin Gregory Mayo arrived by prearrangement at Savage's home to do yard work. Approaching the rear of the house, as was his custom, Mayo noticed that Savage's car was not in the garage, the screen door was wide open, the screen had been cut, and there was blood on the back door itself. Looking through a window, Mayo saw something lying covered up on the floor inside. He entered, lifted the covering, and found Savage's dead body.

After arming himself with an axe handle and a tire iron, Mayo searched the house. He noticed numerous missing items, including two stereo sets, a tape cassette player, miniature speakers, wall statues, clothing, and the upstairs bedroom television set. Mayo summoned the police.

Responding detectives found numerous signs of a violent struggle. There were blood spatters on the front doorknob; spatters and bloody shoe prints were also found in the entry foyer. In the family room, there were spatters on the ceilings and walls, near the fireplace hearth, behind the couch, and on the drapes. A coffee table had been pushed aside, and its glass top was shattered and bloody. One of the liquor bottles on the bar was broken. Telephone cords in the family room and the upstairs bedroom had been cut, though the kitchen telephone had not been disabled. There was no blood on the cut cords. Mayo indicated that a stereo set was missing from the family room, and a speaker wire in that area was torn. A bloody television set remained in the room. There were also bloodstains on the wall of the staircase to the second floor, and in nearby closets.

From the family room, the pattern of blood continued to the back door and out onto an enclosed rear patio. There detectives found Savage's body, lying face down. It had been covered neatly by two towels and perhaps a sheet. The victim's head was resting on a pillow.

The door onto the patio was bent, as if by pushing, and blood patterns suggested the body had been dragged from the door to its final position. A cabinet in the patio had been pried open. The victim was fully clothed, and his clothing was undisturbed. He had sustained multiple stab wounds.

Mayo advised that two distinctive rings were missing from Savage's fingers, but these were later discovered under a rug less than a foot from the body. A gold chain Savage customarily wore was missing.

Mayo noticed that a fireplace tool was missing from the hearth in the family room; the implement was later found in one of the upstairs bedrooms. Mayo also located and turned over to police Savage's private telephone notebook. The notebook included the name "Thad" next to defendant's telephone number.

Pathologist Murdoch performed an autopsy which revealed that Savage had died of stab wounds between 24 and 48 hours earlier. Savage had been stabbed over 40 times in the abdomen, chest, neck, arms, leg, hands, and back. The wounds were most likely inflicted by a buck knife. One wound nearly severed Savage's thumb. The angles of the wounds differed, suggesting the victim was not stationary. Some of the wounds were defensive. Savage had bled to death from six penetrating wounds that punctured the heart and lungs. The liver and spleen had also been perforated by penetrating abdominal wounds. At least two of the wounds on the body were inflicted after death.

The autopsy further disclosed that Savage had eaten recently, and no alcohol or common drugs were found in a sample of his blood. There was no semen in Savage's rectum, though the anal opening was looser than normal. Seminal fluid was found at the tip of the victim's penis, indicating either recent sexual excitement or activity, or ejaculation at death.

Savage was last seen alive on Saturday, April 14, in defendant's company. Amir Falahi worked under Savage in the Extended Opportunity Program at Merced College, and was also a salesclerk at Gottschalk's Department Store in Merced. Shortly before the 6 p.m. closing time on April 14, Savage came into the store with defendant. Savage told Falahi defendant was doing some work for him; as compensation, Savage bought defendant a shirt and pants at a cost of \$20 to \$30.

Augusti Albritton testified that Savage and defendant came to Albritton's home on the evening of April 14. Savage returned a pickup truck borrowed from Albritton earlier in the week and retrieved his own Cadillac. Savage introduced defendant to Albritton during a 30- or 40-minute conversation.

Around 9 p.m. on Monday, April 16, two California Highway Patrol officers driving eastward on Ventura Boulevard in Fresno passed a Cadillac parked in the same direction. Defendant was standing in front of the car,

talking to the driver of another vehicle. The driver's door of the Cadillac was open and sticking out into traffic, creating a hazard.

As the officers made a U-turn to investigate, defendant got into the Cadillac and drove off. The officers made a second U-turn to follow. At the same time, they ran a radio license check and learned that the Cadillac was reported stolen. They continued to follow as defendant ran a traffic light. The officers turned on their red light, but defendant pulled over only after they also activated their siren.

Officer Spencer ordered defendant to alight from the Cadillac and lie on the ground. As this occurred, a further radio dispatch indicated that the Cadillac might have been involved in a Merced murder. Spencer handcuffed defendant and discovered a buck knife in a scabbard on defendant's belt.

The Cadillac was towed and later searched pursuant to warrant. The television missing from Savage's bedroom was found in the car's trunk, and Savage's wallet was found in the glove compartment. Blood was discovered in the Cadillac's trunk and on its front seat. There was also blood on the stolen television, on a piece of paper found in the car, on defendant's buck knife, and on an athletic shoe worn by defendant at the time of his arrest. Samples from the television and the knife were consistent with the victim's blood, but inconsistent with defendant's.

Examination of defendant's person after his arrest disclosed only small scratches on his arms. Defendant had no self-defense wounds or injuries.

B. Defense evidence.

1. *Defendant's testimony.* Defendant took the stand in his own behalf. In response to questions from his own counsel, he acknowledged two prior felonies: a 1982 conviction for receiving stolen property, resulting in a prison sentence, and an earlier robbery conviction, for which defendant was committed to the California Youth Authority (CYA).

Defendant admitted stabbing and killing Savage. However, he claimed the incident was provoked by Savage's sudden, violent sexual advances.

Defendant testified as follows: After his release from prison in September 1983, he returned to Fresno to live with his mother and younger sister. At the time of his arrest for Savage's murder, he was working full-time as a laborer and carpenter's helper, earning \$8 to \$9 per hour.

According to defendant, he was waiting for a bus in Fresno one Friday evening after work. The bus stop was located at the corner of Blackstone

and Belmont, near a homosexual bar. Savage, a stranger, pulled up to the stop in an orange Volkswagen and offered defendant a ride. During the two-mile drive downtown, Savage said he was an engineer from Merced and learned that defendant did occasional yard maintenance work. Savage offered defendant \$30 to do yard work for him on Saturday of the following weekend; defendant accepted. Savage gave defendant his telephone number and agreed to pick defendant up in Fresno, some 50 miles from Merced, if defendant had no transportation.

Telephone arrangements were subsequently made that someone would pick up defendant in Fresno early on the agreed Saturday morning. Savage himself arrived at the appointed time in a pickup truck and drove defendant back to Merced. Defendant was "pretty gone" on marijuana and phencyclidine (PCP).

After working a short time in Savage's yard, defendant took a break and smoked half a "Sherm" (a cigarette laced with PCP). Savage invited defendant in and gave him orange juice. Defendant observed there was more work than one man could do; Savage said not to worry because a relative was coming soon to help. Savage engaged defendant in conversation, learning of his prison and drug problems, and gave defendant a tour of the house.

Sometime before noon, Savage said he needed to take a television to Gottschalk's Department Store for repairs. After they dropped off the set, the two proceeded in the pickup to the Albritton home. They stayed for 15 to 30 minutes, then drove off in a Cadillac, leaving the pickup behind. Savage bought defendant lunch at a Burger King restaurant, and the two then returned to Savage's house. Savage said nothing more about yard work. Defendant played tapes on Savage's stereo. Savage offered defendant drinks, and defendant had three or four brandies.

At some point, Savage said he would buy defendant clothing in compensation for his work, but would not pay cash because defendant would use the money to buy drugs. They drove back to Gottschalk's, where Savage purchased defendant a shirt and a pair of pants. Back at Savage's home, Savage offered to cook defendant dinner; defendant declined. After talking on the kitchen telephone, Savage himself ate a steak meal, inviting defendant to listen to tapes in the meantime.

Savage then agreed to drive defendant home and promised he would be ready in a few minutes. While defendant remained seated in the family room, listening to tapes, Savage went upstairs. Savage returned wearing a T-shirt and blue shorts, placed a hand on defendant's shoulder and said, "Let's go to bed."

After determining he had heard Savage correctly, defendant pushed Savage back, but Savage began chasing defendant through the house. Finally, Savage hit defendant with some sort of wooden club. Defendant kicked Savage in the stomach and ran outside.

After lingering briefly beside the house, defendant walked up the street, smoking a PCP cigarette as he went. He bought a pack of cigarettes in a convenience store; as he emerged, Savage drove up in the Cadillac. Savage approached, apologized for his behavior, and agreed he would take defendant home after they retrieved defendant's coat.

However, once back at the house, Savage resumed his insistent sexual entreaties. Defendant repeatedly refused, offering instead to procure a girl for Savage or to furnish him "spanish fly." Defendant said he only wanted to go home, and he agreed not to tell anyone about Savage's advances. After extended argument, Savage left the room.

Returning, Savage came up behind defendant and grabbed him around the breast, arm, and neck. As the two men struggled, Savage pinned defendant on the couch and was choking him. Defendant pulled his buck knife from his back pocket and attempted to stab Savage in the shoulder. However, defendant missed his aim and the blade struck Savage's neck.

Defendant then pushed Savage off, dropping the knife in the process. Savage picked up a fireplace tool, swung it twice at defendant, and dropped it. As defendant grabbed the tool and turned to retrieve the knife, Savage approached from behind and accidentally fell on the blade, which deeply penetrated Savage's chest and caused severe bleeding.

Though defendant warned Savage to desist, and was now brandishing both the fireplace tool and the knife, Savage kept coming. As he advanced, Savage "was just talking about 'Baby I love you.'" Savage grabbed defendant again, and defendant stabbed Savage "a couple" of times. Again defendant dropped his knife.

Savage then ran to the patio, and defendant ran upstairs. Defendant threw the fireplace tool into one of the bedrooms, went into the master bedroom to get his coat, saw a television on a stand, and picked it up to use as a weapon in case Savage continued the pursuit. After a time, defendant went downstairs to retrieve his knife, still carrying the television. There he saw Savage lying face down on the patio floor. Defendant put down the television, checked Savage's pulse, took off Savage's watch and rings, checked the pulse again, found none, and surmised that Savage was dead.

Defendant jumped on the bar, poured himself a drink, and checked Savage's pulse once more. Finally convinced that Savage had died, defendant went to the bedroom of Savage's daughter, got a white blanket from her bed, and placed the blanket over the body as he had learned from watching television. Defendant then grabbed the television and Savage's car keys, ran outside, threw the television in the backseat of Savage's car, and drove back to Fresno.

According to defendant, he decided not to take Savage's watch and rings before leaving because he thought it was wrong to rob a dead body. He took the television in "panic" and appropriated the car only because he had no other transportation home. Defendant did not remember cutting the telephone cords. He also did not recall stabbing Savage 44 to 46 times, as the autopsy pathologist testified, though his knife was sharp, and he kept jabbing at Savage to keep him away. Defendant could not account for many of Savage's wounds.

Defendant denied using a sheet and pillows to cover Savage's body, said he did not move the body or wipe up blood, and claimed the body was found in a different position than he left it. After returning to Fresno, defendant explained, he parked Savage's car near his home and placed the television in the trunk. He did not intend to sell the television, since it did not belong to him. He did not realize Savage's wallet was in the glove compartment of the car.

Defendant said that the next evening, a Sunday, he moved Savage's car so its hubcaps would not be stolen. Defendant's father drove him to work on Monday morning, and defendant did not use Savage's car for that purpose. After work on Monday, defendant washed and vacuumed the Cadillac's interior. He then set out for Valley Medical Center, where he intended to leave the car in the parking lot. En route, he encountered a woman he knew and stopped to talk to her. The two agreed to meet for a drink. He had begun following her when the Highway Patrol officers overtook and arrested him.

Defendant insisted he was not himself homosexual, and he claimed surprise and panic when confronted with Savage's advances. However, defendant acknowledged he was familiar with homosexuality from his time in prison, and that homosexuality did not particularly bother him. Defendant also indicated he was strong from lifting weights in prison.

2. *Other defense witnesses.* Jay Bradstone had worked at the Back Door, a bar on Blackstone near Belmont in Fresno. Bradstone testified the Back

Door had a reputation as a gay bar, though heterosexuals also patronized it. Bradstone had seen Savage in the bar on two or three occasions.

Merced Detective Strength testified that defendant's home was searched on Tuesday, April 17, 1984, for items listed by Mayo as missing from Savage's home. None was found. Strength also said he saw signs in Savage's home that someone had tried to wipe up the blood near the back door. Finally, Strength claimed Bradstone had mentioned that Savage was a frequent customer of the Back Door.

Phillip Hamm, a psychologist, testified in defendant's behalf. Hamm conducted two interviews with defendant, reviewed police reports and the preliminary hearing transcript, and administered standardized tests for personality traits and intelligence. Dr. Hamm concluded that defendant, though not normally psychotic, is passive, submissive, and below average in intelligence, judgment, and self-esteem. According to Dr. Hamm, defendant feels discomfort in unfamiliar social situations, quickly becomes disorganized under stress, and can easily be influenced by persons he perceives as having greater status and authority.

Dr. Hamm believed defendant felt grateful for Savage's kindness and became confused by Savage's sudden advances, which were calculated to take advantage of Savage's higher social status and defendant's passivity. These conditions, plus defendant's consumption of alcohol and PCP and his sense of isolation from familiar surroundings, diminished defendant's ability to cope with Savage's conduct. Defendant became dissociated during the homicide, experienced an actual or borderline psychotic state, and developed partial amnesia about what had occurred.

C. Prosecution rebuttal.

The People called forensic psychiatrist Stewart Coleman to testify that psychological tests and opinions are useless in the courtroom. Merced Detective Wright was recalled to state he examined a fireplace poker from Savage's house and found no blood. Wright also found no bloody sheet or blanket.

Recalled to the stand, Detective Strength testified that on April 16, 1984, after his arrest, defendant waived his *Miranda*² rights and agreed to talk to the police. Under interrogation, defendant denied knowing Savage. He also responded either that he could not remember, or could not answer, when

²*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

asked whether he had ever been in Merced and where he had been the preceding Saturday night. After such questions had been repeated to similar effect several times, Strength saw that defendant was tired and terminated the interview.

PENALTY TRIAL

A. Prosecution evidence.

The only new prosecution evidence introduced at the penalty phase concerned the circumstances of the homicide. Pathologist Murdoch was recalled to testify in detail concerning the number, angles, depths, and force of the stab wounds in Savage's body. Dr. Murdoch emphasized that most of the wounds were deep and were inflicted with considerable force. According to Dr. Murdoch, the superficiality of certain cuts was caused by the fact that the knife had struck bone before penetrating deeply. Dr. Murdoch's testimony was illustrated by photographs which showed forcep-like devices inserted in the wounds to demonstrate their depths.

B. Defense evidence.

Detective Strength testified that the remote control for the upstairs television was not taken. Ruth Turner, defendant's mother, testified that defendant had been a gentle and helpful child and youth, who made average grades in school and caused little trouble; he gave her a portion of each paycheck from his postprison job as a carpenter's helper. Ms. Turner noted that defendant's brother and three sisters had never been in trouble with the law; two sisters were currently attending college. A half-sister, an older cousin, and a neighbor confirmed that defendant had been quiet, gentle, and loving. A job developer, Louis Coleman, testified that defendant received good reports for punctuality and reliability in postprison job placements.

GUILT ISSUES

A. Sufficiency of robbery evidence.

(1a) Defendant argues there is insufficient evidence for a robbery conviction, for a first degree felony-murder conviction based on robbery,³ and for a robbery-murder special circumstance, because there is no indication he formed an intent to steal from Savage *before* attacking and killing the

³As defendant notes, the jury was instructed on both the premeditation and felony-murder theories of first degree murder. The verdict does not indicate which theory or theories the jury accepted.

victim. (2) Defendant correctly observes that when the intent to steal arose only after force was used, the offense is theft, not robbery. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351 [216 Cal.Rptr. 455, 702 P.2d 613]; *People v. Green* (1980) 27 Cal.3d 1, 54 [164 Cal.Rptr. 1, 609 P.2d 468].) (1b) Moreover, the elements of a robbery-murder special circumstance are not present if theft of the victim's property was merely "incidental" to a murder. (*Green, supra*, at pp. 60-62.)

Defendant points to his "uncontradicted" testimony that he killed in a panic response to homosexual advances, and only then decided to take property of the victim. Defendant suggests this is the only evidence of what occurred and implies it must therefore be accepted at face value. However, the jury was permitted to draw reasonable inferences from all the direct and circumstantial evidence, and could reject portions of defendant's story which seemed inherently implausible. Here, the record as a whole amply supports the verdicts.

In the first place, when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery. Defendant admitted killing Savage, and was in possession of the victim's car, wallet, and television when arrested two days after the homicide. Numerous other items were missing from Savage's home.

Additional persuasive evidence undermines defendant's version of events and supports the prosecution theory that defendant killed to further a robbery. By defendant's own account, he went armed with a buck knife to the fatal appointment with Savage, indicating a preexisting willingness to do harm to one who had befriended him. (See *People v. Alcala* (1984) 36 Cal.3d 604, 626-627 [205 Cal.Rptr. 775, 685 P.2d 1126].) The depth and number of the wounds, the presence of defensive and back wounds, the position of the body, the bloody disarray throughout the house, and the lack of injury to defendant, all indicate Savage was not a violent aggressor, as defendant claims, but was attempting to fend off and escape defendant's murderous attack. (3) (See fn. 4.), (1c) Since property was taken, and nobody else was present, the jury could infer that defendant killed to prevent Savage from summoning help or later identifying defendant as the robber. (See *Alcala, supra*, 36 Cal.3d at p. 627; *People v. Haskett* (1982) 30 Cal.3d 841, 850 [180 Cal.Rptr. 640, 640 P.2d 776].)⁴

⁴"The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder. [Citations.]" (*Alcala, supra*, 36 Cal.3d at p. 626, italics added.) However, brutality can be indicative of calculated violence in context, particularly where, as here, the brutality itself

Savage's telephone cords had been cut, further indicating someone intended to prevent contact with the outside world. Though defendant and the house were spattered with blood after the homicide, the cut cords themselves were bloodless. This suggests the killer cut the lines, and had developed a criminal purpose, before the fatal attack began.⁵

The signs of prying and forced entry, and the amount and nature of the property stolen, also buttress the inference that defendant had a preexisting intent to rob. A jury could deem it doubtful that after committing a sudden, unexpected, and gruesome homicide against a friendly acquaintance, one would remain and, for the first time, decide to force open doors and cabinets, and strip the house of valuable clothing and electronic equipment.

Moreover, the events described by defendant himself suggest that he was not surprised, confused, or frightened by Savage's sexual interest, but rather suspected and exploited that possibility. Defendant insisted he himself was not gay, but he also claimed he was neither naive nor particularly sensitive on the subject. He said his observations of homosexuality in prison did not particularly bother him, and he described the location of his first contact with Savage as a street corner near a gay bar. Considering the circumstances of their meeting, and Savage's eagerness to befriend a younger man from a distant city and a different background, the possibility that the relatively affluent Savage harbored exploitable sexual feelings would have been difficult to overlook. Finally, defendant—young, strong, and armed—had little to fear from his older, more sedentary victim.

The jury was not compelled to credit defense speculation, based only on defendant's implausible testimony, that sometime between Saturday evening and Monday morning, someone else entered Savage's home, cut the telephone cords, stole all the missing property except that found in defendant's possession, moved the body, and re-covered it.⁶ Nor was the jury obliged to accept the defense psychiatric opinion—at odds with other evidence—that defendant killed in a semiconscious psychotic reaction to sudden stress.⁷

contradicts defendant's version of events, and other evidence also supports a theory of premeditation for criminal purposes.

⁵Defendant stresses that the kitchen telephone had not been disabled, even though he knew its location from overhearing Savage take a call in the kitchen. Of course, lapses of memory and planning are not unheard of in the course of violent crimes. And the jury was free to reject defendant's claim that he had overheard such a call.

⁶John Harris, a detective for the Merced County Sheriff's Department, testified for the defense that he was called to investigate a broken key in a lock at the Savage residence. However, the call occurred well after the police had completed their homicide investigation and after the locks had been changed following the investigation.

⁷Defendant points to independent evidence supporting his claim of an unplanned homicide to avoid sexual advances. He notes, for example, suggestions of Savage's gay life-style, signs

On analogous but less compelling facts, and with little discussion, we found "ample circumstantial evidence . . . that defendant had harbored an intent to steal from the outset . . ." (*Ramkeesoon, supra*, 39 Cal.3d at p. 350.) Similarly here, we conclude there was strong and convincing evidence that defendant killed only after deciding to rob.

B. *Failure to instruct on theft as lesser included offense.*

(4a) Defendant argues the court erred prejudicially by failing to instruct sua sponte on theft as a lesser included offense of the robbery charge, and by failing to provide the jury with verdict forms permitting findings and convictions based on theft rather than robbery. Under the particular circumstances, we find no basis for reversal.

(5) "The principles are well established. Theft is a lesser included offense of robbery, which [latter offense] includes the element of force or fear. [Citation.] (6a) The court must instruct on a lesser included offense, even if not requested to do, 'when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.' [Citations.]" (*People v. Melton* (1988) 44 Cal.3d 713, 746 [244 Cal.Rptr. 867, 750 P.2d 741].)

(4b) Though less than convincing, defendant's testimony that he killed in response to Savage's advances, and only thereafter decided to take property, is substantial evidence that defendant did not steal by means of force or fear. (*Ibid.*; see also *Ramkeesoon, supra*, 39 Cal.3d at p. 351; *Green, supra*, 27 Cal.3d at p. 54.) The court therefore erred in failing to provide instructions and verdict forms which would permit convictions and findings based on theft rather than robbery.

Defendant claims we must therefore reverse the robbery-murder special circumstance, the robbery conviction, and the conviction of first degree murder insofar as based on a theory of felony murder. We disagree.

(6b) We have long held that erroneous failure to instruct on a lesser included offense is not prejudicial if "it is possible to determine that . . . the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. . . ."

of the victim's sexual excitement or activity just before death, and indications that defendant did not mind being seen with Savage shortly before the homicide. As we have observed, however, sexual implications in the case do not negate the prosecution's theory of an exploitative robbery-murder. Moreover, defendant need not have formed a robbery plan long in advance, nor planned the perfect crime, to be guilty as charged.

(*People v. Sedeno* (1974) 10 Cal.3d 703, 721 [112 Cal.Rptr. 1, 518 P.2d 913]; see also *People v. Wickersham* (1982) 32 Cal.3d 307, 335 [185 Cal.Rptr. 436, 650 P.2d 311].) (4c) Here, the instructions actually given and the verdicts actually rendered persuade us beyond doubt that the jury considered the question of "after-formed intent" and rejected this "mere theft" theory on its merits. Accordingly, we conclude defendant suffered no prejudice.

At defense counsel's request, the jury was given special instructions highlighting the issue of "after-formed intent." After reciting the elements of robbery, including the element that the "taking be accomplished" by force or fear, the court admonished: "An act of force *accompanied by a theft* does not constitute robbery unless the act of force was *motivated by an intent to steal*. If the intent to steal does not arise until *after* force has been used against the victim, *no robbery has taken place*. [¶] If an individual kills for reasons unrelated to theft, for example, because of anger, fear, or revenge, and then decides to take advantage of the situation by stealing some object from the person of the decedent, *the taking will constitute at most a theft and not a robbery*." (Italics added.) Thus, the jury was told explicitly that it could not find a robbery if it accepted defendant's claim of "after-formed intent."

Next, the felony-murder instructions advised that the killing must have occurred "as a result of the commission of or attempt to commit the crime of robbery, and where there was in the mind of the perpetrator the *specific intent* to commit such crime The specific intent to commit robbery and the commission or attempt to commit such crime must be proved beyond a reasonable doubt." (Italics added.)

Finally, in defining the special circumstance of robbery-murder, the court told the jury it must find, among other things, "that the murder was committed *in order to carry out or advance the commission of the crime of robbery* or to *facilitate the escape therefrom* or to *avoid detection*. [¶] In other words, the special circumstance . . . is *not* established if the attempted robbery was *merely incidental* to the commission of the murder." (Italics added.)

These instructions made clear beyond doubt that defendant was not guilty of robbery, first degree felony murder, or the sole special circumstance charged, if his intent to steal arose only after the fatal assault. In finding for the prosecution on all robbery issues, the jury thus necessarily concluded that he decided to steal before assaulting Savage.

Defendant argues, however, that the court did not eliminate prejudice simply by defining the greater, charged offense with precision. By failing to

allow a conviction of the lesser, uncharged offense of theft, defendant urges, the court left the jury with an "unwarranted all-or-nothing choice" on robbery, murder, and death eligibility. Defendant relies heavily on a similar analysis in *Ramkeesoon*, *supra*, 39 Cal.3d at page 352. (See also *Wickersham*, *supra*, 32 Cal.3d at p. 324.) However, application of *Ramkeesoon*'s reasoning to the facts of this case would extend *Ramkeesoon* beyond its logical limits.

Ramkeesoon befriended one Mullins in a gay bar and accepted an invitation to stay the night in Mullins's apartment. Ramkeesoon was stopped by police while walking in Mullins's neighborhood early the next morning, carrying property belonging to Mullins. Mullins's body, riddled with stab wounds, was soon discovered in the apartment.

Ramkeesoon was charged with robbery and murder. At trial, he claimed he had killed Mullins in response to violent, unwanted sexual advances, and only then decided to take Mullins's watch, wallet, clock radio, and car. The jury received instructions generally defining robbery, and was also instructed on all degrees of homicide, including both premeditation and felony-murder theories of first degree murder. Ramkeesoon sought to exploit his claim of after-formed intent by proffering instructions allowing his conviction of theft as a lesser included offense of robbery. These instructions were erroneously refused. The jury returned general verdicts of robbery and first degree murder.

We found the error prejudicial, since we concluded the jury had never been expressly confronted with the disputed factual issue—the time at which the intent to steal arose—which was posed by the omitted theft instructions. The jury, we noted, was left with an "unwarranted all or nothing choice" [citation] on both the robbery and murder counts [fn. omitted] . . . since [Ramkeesoon] had admitted taking Mullins' property and robbery was the only available theft offense. The findings of robbery and murder did not necessarily resolve the factual question whether the intent to steal was formulated after [Ramkeesoon] had inflicted the fatal blows because the jury was never required to decide specifically whether [Ramkeesoon] had formed the intent to steal after the assault. [Fn. omitted.] (39 Cal.3d at p. 352.)

Here, however, there appears no chance the jury was misled by an "all or nothing choice" on the robbery/theft issue. In contrast with *Ramkeesoon*, *supra*, 39 Cal.3d 346, the special instructions in this case did require the jury to confront and decide the issue of "after-formed intent." The jurors were told emphatically not to convict defendant of robbery or first degree felony murder, or to find the robbery-murder special circumstance true, if

they believed it reasonably possible that he killed for reasons unrelated to theft and stole only as an incidental afterthought. We cannot lightly assume the jury disobeyed such clear instructions on so many separate occasions. Moreover, even if the jurors were willing to convict defendant of robbery despite their belief he was guilty only of theft, we cannot imagine they would employ this reluctant verdict to support findings of *first degree murder* and *death eligibility* under a robbery-murder special circumstance.¹

In this capital case, moreover, the jurors gave one last conclusive indication of their views. Knowing that a murder in the commission of robbery was the sole basis of defendant's eligibility for the death penalty, they nonetheless actually returned a death verdict. Such a normative result seems inconceivable from jurors who believed defendant guilty only of mere incidental theft, but nonetheless felt forced by an "all or nothing choice" to convict him of robbery.

Under these circumstances, we conclude the jury necessarily resolved the issue of after-formed intent adversely to defendant and found, on the ample strength of the evidence, that he killed Savage in the perpetration of a robbery. His claim of reversible error must therefore be rejected.

C. Circumstantial evidence instructions.

The trial court gave a modified version of CALJIC No. 2.02, which advised the jury on how to evaluate circumstantial evidence introduced to prove the accused's "specific intent or mental state." The court also read CALJIC Nos. 8.83 and 8.83.1, which covered circumstantial evidence both generally, and with respect to intent or state of mind, in connection with the robbery-murder special-circumstance allegation. (7) However, defendant claims the court erred prejudicially by refusing also to give CALJIC No. 2.01, the basic circumstantial-evidence instruction.

We find no basis for reversal. Since defendant admitted killing Savage and taking at least some of his property, circumstantial evidence was entirely unnecessary on those issues. The only disputed matter sought to be proved by circumstantial evidence was the specific intent or state of mind with which defendant committed the charged acts. Accordingly, the instructions given covered the ground adequately.

¹Under normal circumstances, we assume jurors follow clear instructions. The "all or nothing" argument addressed in *Ramkeesoon* and *Wickersham*, both *supra*, does suggest the contrary—that jurors will overlook missing elements of a charged offense when deprived of the option to return a lesser appropriate conviction actually supported by the evidence. If so, however, there seems no reason to believe, as defendant suggests, that such jurors will suddenly regain their technical probity and render strictly consistent verdicts on all other issues, whatever the consequences.

D. *Flight instruction.*

(8a) Defendant claims that the giving of a flight instruction, and the wording of the instruction given were erroneous on the facts of this case. We disagree on the merits and find no prejudice in any event.

The trial court gave the following modified version of CALJIC No. 2.52 (4th ed. 1979) (modification in italics): "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. *If there was such flight*, the weight to which such circumstance is entitled is a matter for the jury to determine."

An instruction in substantially this form *must* be given whenever the prosecution relies on evidence of flight to show consciousness of guilt. (§ 1127c.)⁹ (9) A flight instruction is proper whenever evidence of the circumstances of defendant's departure from the crime scene or his usual environs, or of his escape from custody after arrest, logically permits an inference that his movement was motivated by guilty knowledge. (See, e.g., *People v. Cannady* (1972) 8 Cal.3d 379, 391 [105 Cal.Rptr. 129, 503 P.2d 585]; see also *Green, supra*, 27 Cal.3d at pp. 36-37.)¹⁰

(8b) Defendant urges that since the evidence shows only his return to his home town after the homicide, there is no basis for an inference of *guilty flight*. He claims the trial court erred by failing to make a preliminary ruling on this pure question of law, and by leaving its resolution to the jury under the modified language of the instruction. (See *People v. Hannon* (1977) 19 Cal.3d 588, 597-598 [138 Cal.Rptr. 885, 564 P.2d 1203].)

However, the trial court did effectively rule that there was substantial evidence of flight. The court explained there was a "departure" from the

⁹Section 1127c provides in pertinent part: "In any criminal proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: ['(c) The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. . . .']"

¹⁰Guilty flight may be relevant not only where the identity of the perpetrator is at issue, but also where the accused admits some or all of the charged conduct, merely disputing its criminal implications. (See, e.g., *Cannady, supra*, 8 Cal.3d at p. 392; cf. *People v. Hedrington* (1985) 171 Cal.App.3d 517, 519-520 [217 Cal.Rptr. 754]; *People v. Clem* (1980) 104 Cal.App.3d 337, 344 [163 Cal.Rptr. 553].) Defendant admitted killing Savage, but the defense and prosecution differed sharply on the circumstances. The prosecution theorized that defendant intended to murder and rob the victim. Defendant claimed an unintentional killing in self-defense and also denied an intent to steal. Under these circumstances, the prosecution was entitled to use evidence of guilty flight to help prove defendant's criminal state of mind.

homicide scene, the meaning of which must be left to the jury. This was an implicit conclusion that the circumstances of the "departure" permitted an inference of guilty motive.

Moreover, in contrast with *Hannon, supra*, 19 Cal.3d 588, the modified instruction here did not by its terms "[leave] open the possibility that no evidence of [consciousness of guilt] may have been presented. [Fn. omitted.] . . ." (19 Cal.3d at p. 597, italics in original.)¹¹ As the statute requires, the instruction merely allowed the jury to determine from the relevant evidence whether "flight" had been "proved."

Finally, evidence of guilty flight was substantial, if not compelling. *Mere* return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt (*Green, supra*, 27 Cal.3d at p. 37; *Clem, supra*, 104 Cal.App.3d at p. 344; *People v. Watson* (1977) 75 Cal.App.3d 384, 403 [142 Cal.Rptr. 134]), but the *circumstances* of departure from the crime scene may sometimes do so. (E.g., *Cannady, supra*, 8 Cal.3d at p. 391.) There were indications that defendant's departure from the Savage residence occurred with particular haste (a screen door left wide open, the victim's watch and rings left behind), and defendant himself testified he fled in panic, using the victim's car. The jury might well assume that these were normal responses to a grisly homicide, having no independent sinister significance, but that is not the only reasonable inference.

In any event, we discern no prejudice. Since defendant admitted participation in a bloody slaying, the jury was most likely to infer, as the instruction permitted, that his hasty departure was to be expected regardless of his consciousness of guilt. Moreover, the independent evidence that he committed murder in the course of a robbery was extremely strong. We see no reasonable probability that the flight instruction affected the verdicts. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

E. *Single-witness instruction.*

(10) The trial court gave a modified version of CALJIC No. 2.27, which advised that the credible testimony of a single witness is sufficient "proof" of any "fact," but cautioned that before "finding any fact to be proved" by the uncorroborated testimony of a single witness, the jury should "carefully

¹¹The consciousness-of-guilt issue in *Hannon* concerned disputed evidence that the accused had attempted to suppress unfavorable evidence. Under the *Hannon* trial court's instruction, "evidence, if there was any in this case, that the defense attempted to suppress any evidence against the defendant . . . may be considered by you, if you find it exists here as a circumstance tending to show a consciousness of guilt. . . ." (19 Cal.3d at p. 597, fn. 3, italics added in part.)

review" the testimony on which the "proof of such fact" depends. Defendant argues the court erred by omitting a phrase which would have limited the cautionary admonition to the finding of any fact "required to be established by the prosecution."¹² He urges that as given, the instruction unfairly singled out his own testimony for suspicion and wrongly implied he had the burden of "proof" to negate malice.

We recognize that the precision of the standard "single witness" instruction could be marginally improved. However, we see no error or prejudice in the form of instruction given here.

In the first place, we could hardly fault the trial court for instructing as it did, since it followed exactly the form we prescribed in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864 [123 Cal.Rptr. 119, 538 P.2d 247, 92 A.L.R.3d 845]. There we discussed the instruction as a necessary aid to defendants implicated only by the uncorroborated testimony of a single witness, but we did not limit our holding to prosecution witnesses. We declared that a cautionary single-witness instruction, phrased exactly as stated in this trial, "should be given in every criminal case in which no [independent] evidence [corroborating a single witness] is required. . . ." (P. 885, italics added.)

CALJIC later developed its own slightly altered form which optionally limited the instruction to "any fact required to be established by the prosecution." (See CALJIC No. 2.27.) However, the Use Note for the CALJIC instruction advises that the limitation to prosecutorial evidence should be deleted "as to testimony by a single witness of defenses as to which the defendant has the burden of proof." (CALJIC (5th ed. 1988) at p. 55.)

Defendant argues, in essence, that the uncorroborated testimony of a defense witness should never be subject to the cautionary instruction, since the state must prove every element of a charged offense, and the defense has no burden of "proof" of "facts" to which the admonition might apply. (E.g., *People v. Cornett* (1948) 33 Cal.2d 33, 42-43 [198 P.2d 877]; *People v. Hyde* (1985) 166 Cal.App.3d 463, 475 [212 Cal.Rptr. 440]; see *In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 375, 90 S.Ct. 1068].)¹³

¹²The single-witness instruction, as given by the trial court, was as follows (the phrase defendant urges was erroneously omitted is indicated by brackets): "Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact [required to be established by the prosecution] to be proven solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends."

¹³Section 189.5, subdivision (a) (formerly § 1105, subd. (a)), provides that "[u]pon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only

However, an accused is not entitled to a false and unique aura of veracity when his uncorroborated testimony is offered as evidence raising a reasonable doubt that he is guilty as charged. (See *People v. Allison* (1989) 48 Cal.3d 879, 896, fn. 7 [258 Cal.Rptr. 208, 771 P.2d 1294] [false-in-part instruction].) When the accused offers his uncorroborated testimony for this purpose, the jury should weigh such evidence with the same caution it accords similarly uncorroborated testimony by a prosecution witness.

Defendant claims the instruction is nonetheless confusing as here given, since it erroneously suggests the defense, like the prosecution, has the burden of proving facts. On reflection, we agree that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense, while still satisfying the concerns we identified in *Rincon-Pineda*, supra, 14 Cal.3d 864. We encourage further effort toward the development of an improved instruction.¹⁴

However, we cannot conclude that the instant jury was misled. Defendant's testimony conceded he had committed homicide and had taken property. He sought only to disclaim the independent felony (robbery) or the malice necessary for murder. On the other hand, the jury was instructed at length that the People must prove all elements of each charged offense beyond a reasonable doubt, including defendant's specific mental state where relevant. The jury was expressly told that it must acquit defendant of any charge, and find the special circumstance untrue, if it had a reasonable doubt that all elements of the offense or special circumstance had been established. We cannot imagine that the generalized reference to "proof" of "facts" in CALJIC No. 2.27 would be construed by a reasonable jury to undermine these much-stressed principles.

Finally, defendant asserts that since his was the only uncorroborated testimony in the case, the instruction unfairly implied that his testimony alone should not be trusted. Again, however, defendant advances no reason why an accused's uncorroborated testimony is entitled to special credibility. On the contrary, the jury must understand that any uncorroborated information offered by a single witness, defense or prosecution, is to be viewed with caution.

amounts to manslaughter, or that the defendant [sic] was justifiable or excusable." However, given the reasonable doubt standard, this statutory language has long been construed to refer only to a defense burden of producing evidence sufficient to raise a reasonable doubt, rather than a burden of proof or persuasion. (See text authorities, ante.)

¹⁴For example, and solely by way of illustration, such a refined instruction might provide that "you are free to give the uncorroborated testimony of a single witness whatever weight you think it deserves. However, before crediting the uncorroborated testimony of a single witness, you should review such testimony carefully."

Finally, even if we were to deem the instruction erroneous or misleading under the circumstances of this case, we could find no prejudice in light of the very strong prosecution evidence and the inherent improbability of much of defendant's testimony. We therefore find no basis for reversal.

F. False-in-part instruction.

The trial court gave a slightly modified version of the standard false-in-part instruction. (CALJIC, former No. 2.21 (4th ed. 1979), see now CALJIC Nos. 2.21.1, 2.21.2 (5th ed. 1988).) The instruction warned that "[a] witness willfully false in one material part of his testimony is to be distrusted in others." It authorized the jury to "reject the whole testimony" of such a witness "unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars." On the other hand, the instruction cautioned that discrepancies between witnesses, or within a witness's own testimony, do not necessarily indicate general untrustworthiness, since innocent forgetfulness is common, and two persons may see the same events differently.¹⁵

(11) Defendant claims the instruction improperly singled out his testimony alone for suspicion, and thus lessened the prosecution's burden, because the circumstantial evidence presented by the prosecution witnesses was not disputed. The instruction was also invalid here, defendant urges, because there was no evidence that he told any material willful falsehood on the stand. We find no error or prejudice.

False-in-part instructions have been criticized and disapproved elsewhere on grounds that they are superfluous and invite the jury to conclude the court believes one or more witnesses have lied. (See, e.g., *Kinard v. United States* (D.C.App. 1980) 416 A.2d 1232; *State v. Harris* (1970) 106 R.I. 643 [262 A.2d 374, 377]; *Knihal v. State* (1949) 150 Neb. 771 [36 N.W.2d 109, 112-114]; *Rowland v. St. Mary's Bank* (1944) 93 N.H. 246 [40 A.2d 741,

¹⁵The instruction given was as follows (brackets indicate deviation from standard language of CALJIC, former No. 2.21): "A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars. ["] However, discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; [and innocent misrecollection is a common experience;] and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance."

This instruction has now been divided in two. CALJIC No. 2.21.1 (5th ed. 1988) substantially restates the second paragraph of CALJIC, former No. 2.21, and CALJIC No. 2.21.2 (5th ed. 1988) substantially restates the first paragraph of CALJIC, former No. 2.21.

742].) However, we recently rejected challenges to the California instruction, noting it "has been repeatedly approved [in this state] as a correct statement of the law, appropriately given where there is an evidentiary basis to support it. [Citations.]" (*Allison, supra*, 48 Cal.3d at p. 895.)

Citing dictum in *People v. Lescallett* (1981) 123 Cal.App.3d 487, 493 [176 Cal.Rptr. 687], defendant argues the instruction should not be given where it appears principally directed at the exculpatory testimony of the accused. Such a danger exists here, he asserts, because the circumstantial evidence presented by the prosecution witnesses was largely uncontroverted.

We disposed of an identical argument in *Allison, supra*. We noted that the instruction is neutrally phrased and does not focus attention on a particular witness. (48 Cal.3d at p. 895.) Moreover, we emphasized, in this context as in others, "a defendant who elects to testify is not entitled to a false aura of veracity. [Citations.]" (*Id.*, at p. 896, fn. 7, quoting *People v. Beagle* (1972) 6 Cal.3d 441, 453 [99 Cal.Rptr. 313, 492 P.2d 1].) Applying neutral standards of credibility to defense witnesses does not improperly "lessen the prosecution's burden."

Defendant suggests the false-in-part instruction is proper, if ever, only when there are discrepancies between opposing witnesses whose credibility is equally subject to attack. But an inference of willful falsehood can also arise from inconsistencies within the testimony of a single witness (as the instruction itself explains), or when his efforts to explain away undisputed circumstances are inherently implausible.

There were many such instances of implausibility in defendant's testimony. Among other things, he denied cutting telephone cords which were found severed; he denied taking property which was found missing; he was arrested in possession of a television he insisted he picked up only for self-defense; and his claims of defensive "poking" with his knife were inconsistent with the number, depths, and locations of the victim's wounds. Thus, there was ample evidence upon which to base the false-in-part instruction.

In any event, we conclude defendant suffered no prejudice by any applicable standard. Given the strong circumstantial evidence of robbery-murder, and the inherent implausibility of much of defendant's version of events, we cannot conclude the instruction caused any increased distrust of his testimony. There is no substantial chance the outcome was affected. No basis for reversal appears.

G. Correction of verdict.

On the morning of Wednesday, November 21, 1984, the jury returned verdicts on the guilt and special circumstance issues. The forms signed by

the foreman indicated a verdict of guilty of first degree murder (count I) and a true finding on the robbery-murder special circumstance. After the verdicts were announced and the jury was polled, the jurors were admonished, told to return for commencement of the penalty trial the following Tuesday, and released. Neither counsel objected to the form or regularity of the verdicts while the jurors remained present.

On the afternoon of November 21, the jurors having departed, court and counsel realized that the jury had signed and returned no verdict, one way or the other, on count II, the robbery charge. Over defense counsel's objection, the court took the position that it had not *discharged* the jurors, and thus still had jurisdiction to recall them to correct the verdict. In the court's view, it could direct the jurors either to record any decision they had already reached on the robbery count, or to resume deliberations on that issue.

The nine available jurors and the two alternates were recalled to the courtroom the same afternoon; the remaining three jurors could not be found. Juror Obara, the foreman, insisted in open court that the jury had indeed reached a decision on the robbery count. However, Obara recounted, no verdict form had been signed because the jurors had misinterpreted the court's response to an earlier question as meaning that if they found the murder and special-circumstance charges true, they did not have to return a verdict form on the robbery charge. Juror Patten agreed with Obara's account, and no juror present demurred.

Nonetheless, the court decided it was not possible to "proceed" further without all jurors present. The court indicated the jury would therefore be asked to "return next Tuesday morning on that matter [i.e., the robbery count] as well as the others [i.e., the penalty phase]." Those present were again admonished not to discuss the case further or to form any opinion or conclusion "that hasn't already been reached by you, in your deliberations. [¶] In other words, please go no further than your state of mind as of this moment. Whatever that is. . . ."

The full jury returned as ordered on Tuesday, November 27. The court directed the jury to "resume its deliberations" on the robbery count, and the jury retired at 10:12 a.m. Eleven minutes later, the jury returned a verdict of guilty on count II.

(12) Defendant urges that this procedure was erroneous and void because the jurors, once discharged from their guilt phase responsibilities and released from the court's custody and control, could not be recalled to

clarify or complete their verdict. However, we recently held the contrary under substantially similar circumstances.

In *People v. Bonillas* (1989) 48 Cal.3d 757 [257 Cal.Rptr. 895, 771 P.2d 844], the jury in a capital case returned guilty verdicts on charges of murder and burglary, and also found true a burglary-murder special circumstance. However, because a necessary verdict form was mistakenly not furnished, the jury failed to specify the degree of the murder as the law requires. (See § 1157.) The defect was not immediately noticed; the jury was admonished, told to return for the penalty trial, and released.

The next day, a Friday, defense counsel brought the problem to the court's attention. Over counsel's objection, the court ordered the jury to reassemble the following Monday, in advance of the penalty trial, to determine the degree of the murder. Within minutes, the jury returned a finding that the murder was in the first degree.

In an extended discussion, we upheld this procedure. We explained that jurors in a capital case are neither "discharged," nor beyond the court's control, once they have completed guilt phase deliberations. "Where, as here, further proceedings are to take place, the jury has not been discharged, the jurors have been specifically instructed that they are still jurors in the case, they have been admonished not to discuss the case with anyone nor to permit anyone to discuss the case with them, and they have been directed not to read anything about the case, the jurors have not thrown off their character as jurors nor entered the outside world freed of the admonitions and obligations shielding their thought processes from outside influences. Clearly, the jury here remained within the court's control [citations], their verdict was incomplete, and the court was authorized to reconvene the jury to complete its verdict." (48 Cal.3d at p. 773.)

Similarly, the jury in this case rendered an incomplete guilt verdict, since it failed to find on all charged offenses. Nonetheless, before they were released pending the penalty trial, all the jurors were admonished to avoid exposure to all publicity about the case; to refrain from reading or listening to anything about the case; not to discuss "this matter" with anyone or allow anyone to discuss it with them; and "not to discuss the matter among yourselves or with anyone else." Under these circumstances, as in *Bonillas*, *supra*, the panelists had not lost their status as jurors nor entered the world free of court-imposed restrictions on outside influences. The court was therefore authorized to recall them to complete their verdict.¹⁶

¹⁶As defendant notes, the court's admonition at several points could be construed as applying only to the issue of penalty. For example, the court observed that "[s]o far as your state of mind is concerned, while you've reached a verdict with regard to what we refer to as the guilt

Defendant urges that if the jurors could be reconvened for this purpose, at least they should have been instructed clearly to begin their robbery deliberations "anew." He asserts that the nine jurors who heard the ambiguous colloquy between the court and Juror Obara on the afternoon of November 21 could reasonably have inferred the court's "tacit" acceptance of Obara's claim that a robbery verdict had already been reached, and that no further deliberations were necessary. Hence, he implies, the subsequent jury proceedings were fatally infected with improper judicial coercion, as evidenced by the speed of the final robbery verdict.

We see no impropriety. In the first place, when all the jurors returned on November 27, they were clearly told to "resume deliberations." (Italics added.) Second, the colloquy of November 21 had no coercive import. Indeed, though Juror Obara argued that the jury had merely failed to sign the verdict form, he acknowledged in open court he was "sure that won't be accepted . . ." The court promptly responded, "That's right." After hearing further from Obara, the court again stated, "Well, sir, I'm sorry. Without the presence of all of the members of the jury, it's just not possible for us to proceed." Nothing in this exchange could reasonably be construed as the court's agreement that no further deliberations were necessary.

Nor was it error for the court to suggest, as it did on both November 21 and 27, that the jury should take up robbery deliberations *wherever they had left off*. The 12 jurors who reconvened on November 27 were the same panelists who had deliberated on November 20 and 21. Thus, it was not necessary that deliberations begin anew in order to afford defendant his right to "deliberations which are the common experience" of each of the jurors. (Compare *People v. Collins* (1976) 17 Cal.3d 687, 692-693 [131 Cal.Rptr. 782, 552 P.2d 742].)

Finally, defendant argues that if the robbery conviction is invalid on the grounds asserted, the robbery-murder special circumstance must also fall because the former is a "necessary condition" of the latter. (*Green, supra*, 27 Cal.3d at p. 59.) Our finding that the robbery conviction was proper makes it unnecessary to address the special-circumstance issue.

phase of this trial, the penalty phase remains before you." At other points, the court cautioned that "it is very important that you do not discuss . . . the penalty phase with each other at this time" and "that you not form or express an opinion or a conclusion upon the penalty phase of this matter until it's finally submitted to you." (Italics added.) As noted, however, the court also clearly admonished against any unauthorized discussion or information about "this case" or "this matter." We cannot imagine the jurors took any qualified phrases in the court's warning as an invitation to discuss *guilt* issues freely with their families, friends, and fellow jurors.

H. Admission of prior convictions.

Defendant urges that his prior convictions should not have been admitted for purposes of impeachment, since the trial court failed to exercise discretion to admit or exclude them after weighing their probative value against their potential for unfair prejudice. (See *People v. Castro* (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111].) Defendant acknowledges that his trial counsel raised no objection to admission of the prior convictions and did not request that the court exercise its exclusionary discretion. Indeed, defense counsel himself elicited the existence and nature of the prior convictions during his direct examination of defendant. Defendant argues that his counsel thereby rendered ineffective assistance.

(13) Under the particular circumstances, however, we need not brand counsel incompetent in order to address the merits of defendant's claim on direct appeal. Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. (E.g., *People v. Ogunmola* (1985) 39 Cal.3d 120, 123, fn. 4 [215 Cal.Rptr. 855, 701 P.2d 1173]; *In re Gladys R.* (1970) 1 Cal.3d 855, 861 [83 Cal.Rptr. 671, 464 P.2d 127]; *People v. De Santiago* (1969) 71 Cal.2d 18, 22-23 [76 Cal.Rptr. 809, 453 P.2d 353]; *People v. Kitchens* (1956) 46 Cal.2d 260, 263 [294 P.2d 17].) Such is the case here.

In 1982, Proposition 8 added article I, section 28, subdivision (f) (section 28(f)), to the California Constitution, providing that "[a]ny prior felony conviction of any person in any criminal proceeding, . . . shall subsequently be used *without limitation* for purposes of impeachment . . ." (Italics added.) Section 28(f) governed defendant's trial, since the charged crimes occurred after June 9, 1982, the effective date of Proposition 8. (*People v. Smith* (1983) 34 Cal.3d 251, 257-263 [193 Cal.Rptr. 692, 667 P.2d 149].)

It was widely assumed that the "without limitation" language of section 28(f) eliminated *all* restrictions on the admissibility of prior felony convictions for purposes of impeachment. We so paraphrased section 28(f) in our decision upholding the validity of Proposition 8. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 243 [186 Cal.Rptr. 30, 651 P.2d 274] [§ 28(f) permits "unlimited use" of prior felonies for impeachment].) Moreover, at the time of defendant's November 1984 trial, all but one originally published Court

of Appeal decision addressing the issue had so concluded.¹⁷ Under these circumstances, a reasonable and competent criminal trial attorney could well have surmised that any effort to limit or exclude "impeachment" priors in a case governed by Proposition 8 would be futile.

However, in March 1985, after defendant's trial, a majority of this court held in *Castro* that Proposition 8 did not eliminate the trial court's power and duty under Evidence Code section 352 to weigh the probative value of prior convictions offered for impeachment against their potential for unfair prejudice. *Castro* further held that only crimes involving "moral turpitude" are admissible for purposes of impeachment. (38 Cal.3d at pp. 306-316 [plur. opn. of Kaus, J.], 322 [conc. & dis. opn. of Grodin, J.], 323-332 [conc. & dis. opn. of Bird, C. J.].)

Our *Castro* decision thus rejected the overwhelming weight of appellate authority and consciously declined to accept the apparent plain meaning of the constitutional language. (See plur. opn. of Kaus, J., 38 Cal.3d at p. 310 ["subdivision (f) seems clear and absolute . . . —'any' means 'any' and 'without limitation' means 'without limitation,' . . ."]; conc. & dis. opn. of Grodin, J., 38 Cal.3d at p. 319 ["subdivision (f) on its face does not suffer from any lack of clarity or directness"]; conc. & dis. opn. of Lucas, J., 38 Cal.3d at pp. 322-323 [concurring in Grodin, J.'s analysis of § 28(f)].) Defendant's counsel cannot be saddled with the burden of anticipating such an abrupt change in the law.¹⁸ We therefore address defendant's *Castro* claim.

¹⁷See *People v. Rangel* (Cal.App.); *People v. Aldana* (Cal.App.); *People v. Harrison* (Cal.App.); *People v. Castro* (Cal.App.); *People v. Sweeney* (Cal.App.); *People v. Jaurez* (Cal.App.); but see *People v. Miles* (Cal.App.).*

*Reporter's Note: *People v. Rangel* (4 Crim. 14993), opinion deleted upon direction Supreme Court by order dated June 14, 1984; *People v. Aldana* (A020052), opinion deleted upon direction of Supreme Court by order dated April 19, 1984; *People v. Harrison* (3 Crim. 12656), review granted, April 19, 1984, on July 18, 1985, cause transferred to Court of Appeal, Third District, with directions, subsequent opinion was filed on March 4, 1986, but not certified for publication; *People v. Castro* (A02194), review granted March 27, 1984, for subsequent opinion see 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111]; *People v. Sweeney* (4 Crim. 14805), review granted March 22, 1984, cause transferred to Court of Appeal, Fourth District, Division Two, with directions, subsequent opinion filed September 11, 1985, but not certified for publication; *People v. Jaurez* (A021583), review granted February 23, 1984, May 16, 1985 cause transferred to Court of Appeal, First District, Division Five, with directions, subsequent opinion filed June 10, 1985, not certified for publication; *People v. Miles* (2 Crim. 43546), review granted, May 24, 1984, July 25, 1985 cause transferred to Court of Appeal, Second District, Division Four, with directions, for subsequent opinion see 172 Cal.App.3d 474 [218 Cal.Rptr. 378].

¹⁸The People claim defense counsel waived any reliance on *Castro* by himself asking defendant to disclose the fact and nature of the prior convictions. Given the apparent futility of an effort to exclude the prior convictions, however, prudent counsel would be well advised to minimize their "sting" by eliciting them himself. Such defensive acts do not waive an objec-

(14) We note at the outset that the two prior convictions were neither admissible nor inadmissible as a matter of law. (See *People v. Collins*, *supra*, 42 Cal.3d 378, 389, 390, fn. 11.) Both robbery and receiving stolen property necessarily involve moral turpitude. (*Id.*, at p. 395; *People v. Waldecker* (1987) 195 Cal.App.3d 1152, 1156 [241 Cal.Rptr. 650]; *People v. Rodriguez* (1986) 177 Cal.App.3d 174, 178-179 [222 Cal.Rptr. 809].) Moreover, under the facts of this case, the broad authority afforded by *Castro* would have permitted the trial court either to admit or to exclude both prior convictions.

(15) Nonetheless, we find no need for a "*Collins* remand" to enable the trial court to exercise its *Castro* discretion nunc pro tunc. On the facts of this case, we do not consider it reasonably probable that admission of the prior convictions altered the outcome. Hence, the absence of a trial court ruling on the matter must be deemed harmless. (*Collins*, *supra*, 42 Cal.3d at pp. 390-391.)

We recognize some potential for prejudice in both prior convictions. Both were relatively recent and, like the robbery charge at issue here, both involved crimes of dishonesty against property. The prior robbery was an identical charge and implied that defendant was predisposed to steal by force or fear. Revelation of this prior conviction could detract from defendant's efforts to raise a reasonable doubt whether the killing of Savage was related to a robbery.

tion on appeal. (See *Williamson v. Pacific Greyhound Lines* (1949) 93 Cal.App.2d 484, 487 [209 P.2d 146].)

The People speculate that there were other plausible tactical reasons for the defense decision to reveal the priors. We can discern none. In fact, the reasons suggested by the People implicitly assume that counsel acted defensively in light of the apparent futility of a motion to exclude.

Nonetheless, the People also urge that *Castro*'s result was not so unforeseeable as to excuse objection. They stress that such objections were obviously made in the several pre-*Castro* cases which led to appellate opinions. These challenges had consistently been rebuffed, however, and counsel here was not obliged "to anticipate that [we would] later interpret the controlling sections in a manner contrary to the apparently prevalent contemporaneous interpretation." (*Gladys R.*, *supra*, 1 Cal.3d at p. 861.)

For similar reasons, it is not dispositive that, at the time of defendant's guilt trial, we had caused depublishing of every published opinion addressing the "prior impeachment" language of Proposition 8, regardless of result, and had granted hearing in *Castro* and several other such cases. We have long cautioned that such actions on our part have no precedential value and may not be construed as a signal of our ultimate intentions.

Finally, we see no conflict between our decision here and our holding in *People v. Collins* (1986) 42 Cal.3d 378 [228 Cal.Rptr. 899, 722 P.2d 173]. There we implied that the "issue" of appellate relief under *Castro* is presented only by those pre-*Castro* trials in which motions to exclude were erroneously denied without any exercise of trial court discretion. (P. 389.) However, *Collins* did not present, and our opinion therein did not discuss, the question whether *Castro* so changed the law as to excuse prior objection.

However, the valid evidence, both direct and circumstantial, that defendant was guilty of robbery and murder was compelling. Defendant was unable to conform crucial portions of his exculpatory testimony to the undisputed physical facts. His claims about his motives for the homicide were undermined by his admissions that he was familiar with homosexuality and did not object. (See *ante*, at pp. 688-689.) Under these circumstances, we think it highly unlikely that the prior convictions tipped the balance. Hence, there is no basis for reversal, or for further proceedings on the *Castro* issue.

I. Videotape, photos, and autopsy testimony.

Defendant contends he was prejudiced on both guilt and penalty by improper admission at the guilt trial of a videotape depicting the crime scene and the victim's body as initially encountered by the police. He also objects to guilt phase testimony by the autopsy physician, Dr. Murdoch, and related autopsy photos, indicating the number, location, and severity of wounds on the victim's body. Defendant claims these materials were gruesome, inflammatory, irrelevant, and cumulative.

Several responses are appropriate. First, defendant waived these issues on direct appeal by failing to object at trial to introduction of the challenged evidence. Second, defendant may not claim on appeal that counsel's failure to object constituted ineffective assistance. The appellate record does not affirmatively disclose that counsel acted from ignorance or mistake, and there are plausible reasons why competent counsel would not oppose admission of the tape, testimony, and photos. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582 [189 Cal.Rptr. 855, 659 P.2d 1144].)¹⁹

In any event, the challenged evidence was highly pertinent, since the two divergent theories of how the homicide occurred depended for support on details of physical and circumstantial evidence, including a clear understanding of the clues provided by the condition of the victim's body and the crime scene itself. The prosecution was not obliged to prove these details solely from the testimony of live witnesses, and the jury was entitled to see how the physical details of the scene and body supported the prosecution theory of murder for robbery. Hence, the tape, testimony, and photos were

¹⁹Indeed, counsel used the tape in cross-examination of an investigating officer to stress that though the victim's body and the surrounding area were "saturated" with blood, a pillow under the victim's head did not contain blood. This advanced the defense theory that after the homicide, someone other than defendant had entered, stolen property, and placed the pillow. Similarly, competent counsel might conclude that the photos and autopsy testimony, by indicating an "explosion" of violence, supported defendant's theory that he reacted in panic and confusion to a sexual attack.

neither irrelevant nor cumulative. (See, e.g., *Melton, supra*, 44 Cal.3d at pp. 740-742; compare, e.g., *People v. Anderson* (1987) 43 Cal.3d 1104, 1137 [240 Cal.Rptr. 585, 742 P.2d 1306].)

Even if the evidence should have been excluded as irrelevant or cumulative, no reversible prejudice ensued. Our independent review of the tape, photos, and autopsy testimony persuades us that they were not unduly gruesome or inflammatory. (*Anderson, supra*.)

PENALTY ISSUES

A. Section 190.3 notice of aggravating evidence.

(16a) Defendant contends that certain matters urged by the prosecution in aggravation of penalty should have been excluded from consideration for lack of timely notice. He invokes the statutory requirement that "[e]xcept for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty," aggravating evidence may not be presented by the prosecution "unless notice of the evidence to be introduced has been given to the defendant within a reasonable time as determined by the court, prior to trial. . . ." (§ 190.3.)²⁰ To the extent the claim is cognizable on appeal, we see no reversible prejudice.

On Wednesday, November 21, 1984, the trial court received the jury's initial, incomplete guilt verdict and set the following Tuesday, November 27, for commencement of the penalty phase. Defense counsel also indicated to the court on November 21 that he had received no notice of the People's penalty-phase evidence. In response, the prosecutor advised for the first time that the People would assert defendant's earlier crimes as aggravating evidence.²¹ The trial court subsequently ruled that, because of the late notice, the prosecutor could present no new evidence of these crimes, but would be confined to the information already elicited from defendant himself at the guilt phase.

²⁰As pertinent here, section 190.3 provides: "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation."

²¹Among the "aggravating factors" listed in section 190.3 are "[t]he presence or absence of criminal activity by the defendant [other than the current charges] which [activity] involved the use or attempted use of force or violence or the express or implied threat to use force or violence" (subd. (b)), and "[t]he presence or absence of any prior felony conviction" (subd. (c)). The prior robbery conviction was pertinent under both subdivisions (b) and (c) (see *Melton, supra*, 44 Cal.3d at p. 764); the prior receiving conviction was pertinent under subdivision (c).

On the morning of November 27, the prosecutor first advised in open court that he intended to recall Dr. Murdoch, and to introduce photos not offered or admitted at the guilt trial, to demonstrate the great force with which the knife blows were delivered.²² The prosecutor disclosed that the new photos would show forceps inserted in the wounds to indicate their depth.

Defense counsel objected *in limine*, but only on grounds that (1) the evidence was unduly prejudicial under Evidence Code section 352 and (2) Dr. Murdoch had already been examined at length. The *in limine* objection was overruled. At that moment, the jury reported it had a belated verdict on the robbery count. The jury was recalled, its verdict was received and recorded (*ante*, at pp. 699-700), and the penalty phase began immediately. Aided by the autopsy photos, Dr. Murdoch thereupon gave the testimony predicted by the prosecutor.

As ordered, the prosecutor introduced no new prior-crimes evidence. However, in his closing argument, he urged the guilt phase evidence of defendant's prior convictions as aggravating.

At the outset, we doubt defendant has preserved the notice issue for appeal. As to the Murdoch testimony and photos, he never raised *any* specific *notice* objection in the trial court. Moreover, he did not *timely* object in either case. Because *in limine* rulings on evidence are subject to reconsideration upon full information at trial, an evidentiary objection must be renewed "at such time as the evidence is actually offered" (*People v. Boyer* (1989) 48 Cal.3d 247, 270, fn. 13 [256 Cal.Rptr. 96, 768 P.2d 610]; *People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3 [251 Cal.Rptr. 278, 760 P.2d 475].), or when opposing counsel makes improper argumentative use thereof.²³

Nonetheless, to forestall claims of ineffective assistance, we briefly address the merits. We find no denial of any substantial right protected by the notice provision of section 190.3. Defendant was notified on November 21, some six days before the penalty trial began, that the People intended to invoke the prior crimes revealed by defendant in his guilt phase testimony.²⁴

²²This evidence was relevant in aggravation of penalty under subdivision (a) of section 190.3, as concerning "[t]he circumstances of the crime[s] of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true."

²³Failure to object to improper argument does not waive the issue on appeal if an admonition to the jury would not have cured the harm. However, any prejudice from improper reference by the prosecutor to defendant's prior crimes could have been cured by prompt admonition.

²⁴The prosecutor's notification was oral, but the statute does not mandate written notification. (*People v. Miranda* (1987) 44 Cal.3d 57, 96-97 [241 Cal.Rptr. 594, 744 P.2d 1127].)

Defense counsel initially indicated he might seek a continuance to meet the proposed aggravating evidence, but no continuance was actually requested.

On the morning of November 27, counsel objected *in limine* to new documentary evidence on the prior convictions which the prosecutor proposed to introduce, but when the prosecutor thereupon offered to withhold the documents, defense counsel agreed there would "[b]e no problem." On appeal as below, defendant does not even hint that his preparation for trial was actually hindered by the timing of the prosecution's prior-crimes notice, and the record discloses no such prejudice. (See *People v. Keenan* (1988) 46 Cal.3d 478, 525-526 [250 Cal.Rptr. 550, 758 P.2d 1081]; *People v. Howard* (1988) 44 Cal.3d 375, 424-425 [243 Cal.Rptr. 842, 749 P.2d 279].)

Such is also the case with respect to the Murdoch evidence and photos. Though counsel received virtually no notice that Murdoch would be recalled, he sought no continuance to meet the new evidence. During discussion of the proposed testimony, counsel indicated great familiarity with what Dr. Murdoch would say, and he subsequently cross-examined Dr. Murdoch at length to emphasize that there were a substantial number of superficial wounds as well as penetrating ones. Again, defendant makes no appellate claim that he was actually hampered by the late notice.

(17) (See fn. 25.), (16b) Finally, by any applicable standard, admission of the evidence cannot have affected the penalty verdict.²⁵ At the guilt phase, Dr. Murdoch had already testified at length that the victim suffered more than 40 wounds over his entire body, that his thumb was nearly severed, and that several of the abdominal wounds had penetrated deeply. Photos introduced at the guilt phase had clearly depicted these wounds. (See *ante*, at p. 706.)

Thus, the additional inflammatory effect of the new penalty phase testimony and photos was minimal at best. Moreover, the prosecutor's succinct closing argument made only brief and mild references to the prior crimes, concentrating instead on the circumstances of the capital crimes. We see no basis for reversal.

²⁵We find state-law error at the penalty phase harmless if there is no "reasonable possibility" the error affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-449 [250 Cal.Rptr. 604, 758 P.2d 1135].) Defendant, however, suggests that the notice required by section 190.3 is a state-defined *federal due process* right (cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 180, 100 S.Ct. 2227]), thus arguably invoking the "beyond reasonable doubt" standard of harmlessness. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710, 87 S.Ct. 824, 24 A.L.R.3d 1065].) We need express no views on these issues.

B. Jury's understanding of sentencing responsibility.

(18) Defendant claims the court committed error by instructing, in the "unadorned" language of the 1978 death penalty law, that the jury "shall" impose the death penalty if persuaded the aggravating factors "outweigh" those in mitigation. (§ 190.3; CALJIC (4th ed. 1979) former No. 8.84.2.) We have observed that in particular circumstances this language, unless further explained, might be misunderstood to require a "mandatory" and "mechanical" penalty determination, devoid of normative discretion to decide the "appropriate" penalty under all the circumstances. (E.g., *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1278 [232 Cal.Rptr. 849, 729 P.2d 115]; *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17 [220 Cal.Rptr. 637, 709 P.2d 440].) In *Brown*, *supra*, we therefore called for clarifying instructions in future cases. We stated we would examine the individual merits of each pre-*Brown* trial in which an unadorned "shall/outweigh" instruction was given to determine whether, under all the particular facts, a reasonable jury may have been misled. (40 Cal.3d at p. 544, fn. 17, p. 545, fn. 19.)

We see no such possibility here. In the first place, the court instructed that "any evidence of an aggravating factor" was to be disregarded unless the jury unanimously found it true beyond a reasonable doubt. On the other hand, the jury was told to consider in mitigation not only the specific factors listed, but "any other aspect of the Defendant's character or record that the Defendant offers as a basis for [a] sentence less than death."²⁶ These instructions implied that the penalty determination required extreme responsibility and reliability in the evaluation of aggravating factors, yet was a broad inquiry demanding sympathetic concern for all subjectively extenuating factors of defendant's life and character. (Cf. *Melton*, *supra*, 44 Cal.3d at p. 761.)

More importantly, the prosecutor, despite occasional forays into mechanical and mandatory language, made clear that the jury was to arrive at the "appropriate" penalty by "weighing" the aggravating and mitigating factors in light of their own consciences. Early in his argument-in-chief, the prosecutor did say the ultimate decision was "obvious" once the aggravating and mitigating factors had been "weighed."²⁷ Moreover, in his rebuttal, he suggested that if aggravating and mitigating circumstances were merely "counted," the former would prevail.

²⁶The latter instruction was given in compliance with our direction in *People v. Easley* (1983) 34 Cal.3d 858, 878, footnote 10 [196 Cal.Rptr. 309, 671 P.2d 813].

²⁷After restating the "shall/outweigh" language of the instruction, the prosecutor explained, "... You're to weigh them, and if one, if the aggravating outweighs the mitigating, then, decision's obvious. Otherwise it's obvious the other [direction]." (Italics added.)

However, the prosecutor also emphasized that the law did not make it as "simple" as counting, but required a subjective "weighing" process in which the jurors themselves decided how much weight to give each factor.²⁸ Moreover, the prosecutor pursued the overall theme that death was the penalty defendant deserved for his crimes. The prosecutor acknowledged that the jury was entitled to show defendant sympathy and mercy, though suggesting that compassion was inappropriate in light of defendant's callousness to his victim.²⁹ Defendant claims the prosecutor tried to persuade the jury it had no moral responsibility for a death verdict. However, the context is otherwise; the prosecutor merely indicated the jury should resist defense efforts to equate the moral burden of a death judgment with that attending the murder itself.³⁰

Defense counsel's argument reinforced the notion that the penalty determination was normative and subjective. As counsel declared, "... When it comes down to judging [the relevant sentencing] factors, balancing those factors, the law's quite vague in my opinion. [¶] The critical term is outweighed. Does aggravation outweigh mitigation. And I think the law fails to give you much definition at this point. I think a lot is left up to you." Counsel stressed the regard expressed for defendant by relatives and neighbors, argued there was lingering doubt of a robbery motive for the murder, and urged that a death verdict might repeat defendant's mistake of presuming the right to take life.

²⁸The prosecutor declared, "If we count under the law, the mitigating factors and the aggravating factors [as the prosecutor had listed them], if we just count them, one, two, three, four, and add them up, the chances are you'll find that there are more aggravating factors than mitigating factors in this case. But, the law doesn't make it that simple. [¶] It doesn't say what weight you give to each factor. And ultimately it's up to you. But, if [you] simply look at those factors and add them up, mechanically, you'll probably see there are more aggravating factors against the Defendant than [there] are mitigating factors." (Italics added.)

²⁹In his closing argument-in-chief, after listing his version of the pertinent aggravating and mitigating circumstances, the prosecutor said, "The main thing it seems to me to consider is what has the Defendant done? It's by his acts that a person really is known. It's by his acts that the person really is. [¶] ... [¶] He has earned no sympathy from you. Although the law mentioned sympathy, mercy, certainly if you give him sympathy or mercy or pity, that he gave to that victim, there will be no question about your decision. [¶] Whatever you give, he has earned, he has deserved by his conduct." Returning to this theme at the conclusion of his rebuttal argument, the prosecutor declared, "If you show mercy or pity or sympathy, you certainly will not be showing that, you will be showing something that the Defendant did not show [to] anybody. [¶] Whatever your decision is, I'm sure the community will appreciate your time and effort here, whatever your decision is, will be a proper one."

The prosecutor's implication that the jury had been told it could consider sympathy and mercy is not clearly supported by the record. The court intended to give such an instruction, the clerk's transcript lists it as given, and the jury apparently had printed copies of the instructions. However, the reporter's transcript does not show that a "pro-sympathy" instruction was read to the jury in open court.

³⁰At the outset of his rebuttal argument, the prosecutor observed, "Counsel seeks to place upon your conscience the burden and equates it with what Thaddaeus did. That's wrong. And you shouldn't allow that to happen to you." (Italics added.)

Under these circumstances, we cannot imagine a reasonable jury would believe it should merely evaluate the aggravating and mitigating factors in some mechanical way, without deciding what penalty defendant deserved under all the evidence. We see no basis for reversal.

C. Elimination of "other violent crimes" factor from list of aggravating circumstances.

(19) After discussion with counsel, the trial court eliminated factor (b), "[t]he presence or absence of criminal activity by the defendant [other than the currently charged crimes] which [activity] involved the use or attempted use of force or violence or the express or implied threat to use force or violence" (italics added), from the list of aggravating and mitigating circumstances to be read to the jury. (§ 190.3, subd. (b).) The only instructional reference to defendant's "other crimes" was that set forth in subdivision (c) of section 190.3: "[t]he presence or absence of any prior felony conviction." Defendant now claims this was prejudicial error, in that it prevented the jury from realizing that his lack of other violent crimes was a mitigating factor.

We disagree. In the first place, any "error" was invited by defendant himself. Defense counsel submitted the instruction in the form finally given. The prosecutor opposed deletion of factor (b) on grounds that, even though the circumstances of defendant's prior robbery had not been introduced, the least adjudicated elements of the robbery necessarily implied violence. On the other hand, both the court and the prosecutor reminded defense counsel of the "presence or absence" language, pointing out that the omitted factor would aid defendant if in fact his background lacked violence. Still, defense counsel indicated his "preference" that factor (b) be omitted, and his position prevailed.

On this record, counsel's tactical purpose is obvious. Counsel knew that only defendant's bare reference to a prior robbery conviction had been allowed in evidence. Counsel sought to confine the jury's consideration of this incident accordingly, and to foreclose a prosecution argument that the robbery counted not only as a prior conviction, but also as a "violent" crime. (See *Melton, supra*, 44 Cal.3d at p. 764.) This clear tactical decision prevents a contention on appeal that any resulting error is grounds for reversal. (*People v. Avalos* (1984) 37 Cal.3d 216, 228-229 [207 Cal.Rptr. 549, 689 P.2d 121]; cf. *Wickersham, supra*, 32 Cal.3d at pp. 334-335.)

In any event, there was no reversible prejudice, because counsel's tactic had the desired result. The prior robbery was, in fact, a violent crime within the meaning of section 190.3, subdivision (b). Had a reference to subdivision

(b) been included in the instruction, the prosecutor would most likely have so argued, thus enhancing this prior conduct as an aggravating factor in the jurors' eyes. Deletion of instructional language based on section 190.3, subdivision (b), did not prevent the jury from considering past "nonviolence" as a circumstance in defendant's favor.

D. Prosecutor's reference to "unlisted" aggravating factors: prosecutor's argument that absence of mitigating factors was aggravating.

Defendant urges that two instances of improper argument by the prosecutor warrant reversal of the penalty judgment. First, defendant suggests, the prosecutor urged certain circumstances as aggravating though they are not listed by section 190.3 as relevant to sentencing. (See *People v. Boyd* (1985) 38 Cal.3d 762, 771-776 [215 Cal.Rptr. 1, 700 P.2d 782].) Second, defendant asserts, the prosecutor argued aggravation from the mere fact that certain mitigating factors listed in the statute were absent. (See *People v. Davenport* (1985) 41 Cal.3d 247, 288-290 [256 Cal.Rptr. 96, 768 P.2d 610].)

Defendant raised no objection to the prosecutor's comments when they were made, though prompt admonitions would have cured any prejudice. Despite plausible claims that the alleged instances of misconduct were thus waived on appeal (e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 771 [239 Cal.Rptr. 82, 739 P.2d 1250]), we have previously evaluated such unchallenged prosecutorial arguments made in trials before *Boyd* and *Davenport*, were decided. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701, 774 P.2d 730], and cases cited.)

(20) Having done so here, we see no ground for reversal. Defendant first urges impropriety in the prosecutor's assertions that defendant was incarcerated for each of his prior felony offenses, and that he committed the Savage murder within months after his most recent release. As defendant notes, neither prior "prison sentences," nor the time between release from prison and new criminal conduct, are statutorily listed aggravating factors.

However, the prosecutor did not state that defendant's self-admitted prior incarcerations were independent aggravating factors. He simply noted, as one of the "circumstances of the [current] crime" (§ 190.3, subd. (a)), that the murder of Savage occurred soon after defendant's release from felony incarceration. The prosecutor may, of course, broadly argue all reasonable inferences from statutorily admissible aggravating evidence. (See *Davenport, supra*, 41 Cal.3d at p. 288; see also *Miranda, supra*, 44 Cal.3d at pp. 110-111.) The suggestion that the Savage homicide took place under "circum-

stances" indicating defendant's unwillingness to learn from prior punishment was entirely proper. (Cf. *People v. Balderas* (1985) 41 Cal.3d 144, 202 [222 Cal.Rptr. 184, 711 P.2d 480].)

(21) Defendant correctly notes that the prosecutor thrice improperly referred to the absence of a mitigating factor as aggravating. According to the prosecutor, if the jury believed that Savage was not a participant in his own homicide (see § 190.3, subd. (e)), that defendant had no belief in moral justification for the killing (*id.*, subd. (f)), and that defendant did not kill under extreme duress or domination (*id.*, subd. (g)), those were circumstances in aggravation.

Under similar circumstances, we have consistently declined to deem such improper argument a basis for reversal of a death judgment. This jury was instructed to consider a particular sentencing factor only "if applicable." Moreover, as already indicated, the jurors were not misled about their discretion and responsibility to determine the appropriate penalty under all the evidence. (*Ante*, at pp. 709-711.)

Where this is so, "we have assumed reasonable jurors would understand how to evaluate the absence of particular mitigating factors. [Fn. omitted.] . . ." (*Hamilton, supra*, 48 Cal.3d at p. 1184.) Such jurors are unlikely to give substantial aggravating weight to the absence of obviously mitigating factors, such as victim participation or consent, belief in moral justification, or extreme duress or domination, which are rarely present in capital homicides. (Cf. *Davenport, supra*, 41 Cal.3d at p. 289.)

Moreover, the instant jury was confronted with a particularly savage murder, committed for purposes of robbery against a victim who had befriended defendant and shown him kindness. Defendant had at least two recent prior felony convictions, one embracing violence. In mitigation, defendant showed only that he was loved and considered gentle by family and friends, and had been reliable in recent job performance. In view of the overwhelming balance of valid aggravating evidence, we see no reasonable possibility the prosecutor's mischaracterizations affected the penalty verdict. (See *Hamilton, supra*, 48 Cal.3d at pp. 1184-1185; *Brown, supra*, 46 Cal.3d at pp. 447-448.) No ground for reversal is shown.

E. *Motion to modify death verdict under section 190.4, subdivision (e).*

Defendant argues that the case must at least be remanded to the trial judge for redetermination of the automatic motion to modify the death verdict. (§ 190.4, subd. (e) (hereafter § 190.4(e).) Defendant claims that, in

denying the motion, the judge erred by relying upon nonstatutory aggravating circumstances, by ignoring mitigating evidence, and by failing to exercise his independent judgment whether death was the appropriate punishment. Our examination of the judge's decision on the motion shows no necessity for a remand.

Section 190.4(e) creates an automatic motion for modification of any death verdict returned by the trier of fact. When ruling on the motion, the trial judge "shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings."

The trial judge here commenced his ruling by quoting his duties from the statute, and by reciting the aggravating and mitigating factors set forth in section 190.3 which he was obligated to consider. Next, the judge discussed the basic facts of the homicide. The judge suggested the jury had obviously rejected defendant's claim of sudden panic and rage, accepting instead "a great deal of evidence" that defendant planned in advance to harm the victim, perhaps in part because of dislike for homosexuals. Given the other evidence of premeditation, said the judge, the number and force of the stab wounds supported an inference that defendant "made sure of the attainment of his objective of putting down a man like Mr. Savage."

Next, as defendant suggests, the judge began to evaluate the circumstances of the homicide in terms apparently (though not explicitly) derived from the aggravating and mitigating factors set forth in the California Rules of Court, division III, Sentencing Rules for the Superior Courts (Sentencing Rules). The judge noted defendant's use of a weapon (see Sentencing Rule 421(a)(2)) and indicated that the victim might be considered "vulnerable" to the extent he was unarmed and unaware of defendant's intent (see Sentencing Rule 421(a)(3)). On the other hand, the judge observed, there was only one victim and one killer; this case did not involve defendant's "leadership" of a criminal enterprise. (See Sentencing Rules 421(a)(4) [multiple victims as aggravating], 421(a)(5) [defendant's "leadership or dominance of other participants" as aggravating].) The judge found evidence of "planning in the sense of the cut telephone wires" (see Sentencing Rule 421(a)(8) [planning, sophistication, or professionalism indicating premeditation as aggravating]), and observed that defendant used a position of trust to steal substantial property (see Sentencing rules 421(a)(12) [advantage from position of trust as aggravating], 421(a)(10) [great value of property taken as aggravating]).

The judge pointed to defendant's prior "prison" record (see Sentencing Rules 421(b)(3) [prior prison record as aggravating], 423(b)(1) [absence of significant prior criminal record as mitigating]), including the recency of his release prior to the homicide. Given the jury's obvious acceptance of the prosecution's robbery-murder theory, said the judge, "the defendant didn't play a passive or minor role in this matter" (see Sentencing Rule 423(a)(1) [passive or minor participation as mitigating]). Finally, the judge remarked, no "mistake" was involved (see Sentencing Rule 423(a)(7) [mistaken belief in right as mitigating]), and defendant had not voluntarily admitted wrongdoing (see Sentencing Rule 423(b)(3) [defendant's early voluntary acknowledgment of wrongdoing as mitigating]).

Thus, the judge summarized, there was "every reason to believe" that defendant committed first degree murder in the commission of robbery, and that the aggravating circumstances outweighed those in mitigation. The judge saw no indication of a penalty jury inflamed by passion. He acknowledged defendant's status as a human being, but observed that the victim also had humanity. The judge then ruled that the motion for modification of the jury's choice of penalty for the offense should be denied.

(22) Defendant first urges that the judge's obvious reference to the Sentencing Rules constituted improper consideration of "nonstatutory" aggravating factors. (See *Boyd*, *supra*, 38 Cal.3d at pp. 771-779.) For several reasons, we disagree.

The judge indicated at the outset his understanding that section 190.3 contains the pertinent sentencing factors. Moreover, even if derived from the Sentencing Rules, some of the factors mentioned by the judge were hardly more than rephrasings of those set forth in section 190.3. (See, e.g., § 190.3, subds. (c) [presence or absence of prior felony convictions], (j) [defendant's status as mere accomplice or minor participant].)

In any event, defendant's argument is more fundamentally flawed. In *Boyd*, *supra*, we held only that the prosecution may not introduce penalty evidence unless it bears upon one of the aggravating factors listed in section 190.3. (38 Cal.3d at pp. 771-774.) We subsequently made clear, however, that counsel may broadly argue, and the sentencer may presumably weigh, all reasonably pertinent inferences from the evidence validly introduced under any factor. (*Davenport*, *supra*, 41 Cal.3d at p. 288; see also *Miranda*, *supra*, 44 Cal.3d at pp. 110-111.)

Section 190.3, subdivision (a) permits the sentencer to consider, in aggravation or mitigation, the "circumstances of the [capital] crime . . . and the existence of any special circumstances found . . . true." (Italics added.)

While subdivisions (d) through (k) of section 190.3 set forth those aspects of the capital offense which the law deems specifically pertinent to the penalty determination, these paragraphs do not limit the sentencer's power, under subdivision (a), to weigh any other constitutionally-permissible aspect of the offense which the sentencer deems pertinent to the appropriate penalty. Though he did not confine himself to the language of section 190.3, subdivisions (d) through (k), the judge offered pertinent reasons why, in his independent judgment, the aggravating circumstances outweighed the mitigating, and the death verdict was not contrary to the law or the evidence.

Defendant urges that the factors derived from the Sentencing Rules, which were designed for noncapital cases, have little logical relevance to the life-death determination. He suggests that such factors as planning, use of a weapon, major participation, significant property loss, lack of voluntary remorse, and the like, are virtually assumed in cases where the most lenient possible penalty is life imprisonment without parole. (Cf. *Davenport*, *supra*, 41 Cal.3d at p. 289.) We cannot accept this untested assumption. Indeed, in our experience, counsel typically argue that factors such as these, where suggested by the evidence, are pertinent to the capital penalty determination.

The judge in this case simply evaluated the "circumstances" of defendant's capital crime, all of which were validly in evidence, under a normative framework familiar to him from another context, but relevant as well to capital sentencing. In so doing, he committed no error.³¹

(23) Defendant claims the judge ignored constitutionally relevant mitigating evidence of defendant's character and background unrelated to the capital offense. The argument stems from the judge's failure to mention such evidence in detail on the record. However, the judge had previously instructed the jury to weigh such evidence, and at the beginning of his ruling on the section 190.4(e) motion, he expressly declared his own obligation to consider it. He never stated or implied that he deemed such evidence legally irrelevant. He acknowledged defendant's "status as a human being," but indicated he simply found the factors in aggravation preponderant. (See, e.g., *People v. Rich* (1988) 45 Cal.3d 1036, 1123 [248 Cal.Rptr. 510, 755 P.2d 960].) We see no evidence of impropriety.

³¹ Defendant does not claim, and our review of the judge's remarks does not suggest, that the judge found aggravation from the mere absence of elements which, under section 190.3, could only be considered mitigating in a capital case. (See *Davenport*, *supra*, 41 Cal.3d 247.)

Defendant does urge that the judge erroneously considered defendant's prior "prison term," a factor both unrelated to the capital crime and unlisted in section 190.3. However, as we have previously explained, defendant's recent release from prison is a "circumstance" of the capital crime which is logically relevant to penalty, since it suggests that defendant was unswayed from criminal conduct by his recent incarceration.

(24) Finally, defendant urges the judge failed to exercise his "independent judgment" about the appropriate penalty. Assuming the trial judge has such a duty under section 190.4(e), defendant points to no indication that the duty was breached. When the judge's comments are read as a whole, they reveal his personal belief that defendant committed a premeditated robbery-murder against a trusting victim, that aggravation outweighed mitigation, and that the jury's verdict of death was appropriate under all the circumstances.³²

F. *Proportionality review.*

(25) Defendant urges us to adopt a system of comparative, or intercase, proportionality review. He presents an elaborate survey of published Court of Appeal decisions to demonstrate the hypothesis that many first degree murderers of equal or greater culpability have received sentences less than death.

Comparative proportionality review is not constitutionally required, and we have consistently declined to undertake it. (E.g., *People v. Sheldon* (1989) 48 Cal.3d 935, 960 [258 Cal.Rptr. 242, 771 P.2d 1330]; *Jennings, supra*, 46 Cal.3d at p. 995.) However, the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution preclude the imposition of punishment that is not proportionate to the defendant's individual culpability. (*People v. Karis* (1988) 46 Cal.3d 612, 649 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Dillon* (1983) 34 Cal.3d 441, 477-484 [194 Cal.Rptr. 390, 668 P.2d 697]; *In re Lynch* (1972) 8 Cal.3d 410, 423-429 [105 Cal.Rptr. 217, 503 P.2d 921].)

Defendant, while a guest in the victim's home, committed a savage, sustained, and murderous knife assault upon his unarmed host. As we have discussed, the evidence strongly suggests that defendant planned in advance to rob and personally kill the victim, relying on feigned friendship to win the victim's trust and gain access to his property. Given defendant's calculated brutality in aid of an independent felonious purpose, we cannot conclude that the death penalty is disproportionate to defendant's individual culpability.

³²After discussing the evidence in detail, the court observed that "there is every reason to believe . . . that the Defendant committed the murder of—there was murder in the first degree, that it was committed in the commission or attempted commission of robbery, and furthermore that the aggravating factors outweigh the mitigating factors. [¶] . . . [¶] I recognize Mr. Turner as being a human being. Roy Savage was a human being. Mr. Savage is dead. And he died at the hands of Mr. Turner. And the jury decided that it was the death penalty that should be imposed on Mr. Turner for the offense. [¶] And the Court believes under all the facts and circumstances of this case that the application for modification of that verdict should be and it is denied." (Italics added.)

DISPOSITION

The judgment is affirmed in its entirety.

Lucas, C. J., Panelli, J., and Kaufman, J.,* concurred.

BROUSSARD, J.—I dissent. The majority recognize that the trial court erred in failing to instruct on the lesser included offense of theft and in failing to provide theft verdict forms. The errors are of constitutional dimension depriving a defendant of the fundamental fairness demanded by due process.

The majority fail to recognize the extent of prejudice flowing from the errors. Defendant told a plausible story that the fight was triggered by decedent's attack and that he decided to steal after the death. The prosecution theory is hard to believe in light of the undisputed circumstantial evidence: it is difficult to believe that when defendant set out from Fresno to Merced and brought along only a knife that he intended to rob. It is equally difficult to believe that after spending time with decedent and his friends and acquaintances defendant decided to rob. The choice of weapon is uncommon for robbery and people seldom rob when they may be so easily identified and located.

In a case such as this, where the defendant takes the stand and confesses to theft, the effect of the errors is to deny the defendant any instruction on his defense. Instead, the jurors were placed in the position that, if they were to credit defendant's testimony, they would have to acquit defendant even though they heard him confess to felonies from the witness stand. In these circumstances, it is likely that the jurors, rather than give defendant the benefit of the reasonable-doubt instruction that is fundamental to our criminal law, would lean over backward to find defendant guilty of robbery in order to avoid acquitting a confessed felon. The unfairness is manifest.

The majority argue that the errors were not prejudicial because the factual question posed by the omitted instruction was necessarily resolved against defendant under other, proper instructions. However, those instructions were applicable on the basis of a finding of robbery, which is the result of the error, and the jury once having made the factual determination that the intent to steal preceded the fight could not be expected to fairly reconsider the same factual issue. The later instructions did not eliminate the

*Retired Associate Justice of the Supreme Court sitting under assignment by the Acting Chairperson of the Judicial Council.

prejudice flowing from the errors. The asserted factual finding flowing from those instructions in effect flows directly from the errors.

I. THE ERRORS

The right to instructions on lesser included offenses is an aspect of the fundamental fairness demanded by due process, and such instructions are required in capital cases by the federal Constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 627 et seq. [65 L.Ed.2d 392, 396, 100 S.Ct. 2382].) The right in noncapital cases is an incident to due process guaranteed by our state Constitution. Absence of lesser-included-offense instructions diminishes the reliability of the determination. (*People v. Geiger* (1984) 35 Cal.3d 510, 518-520 [199 Cal.Rptr. 45, 674 P.2d 1303, 50 A.L.R.4th 1055].)

Theft is a lesser included offense to robbery, which includes the additional element of force or fear. (*People v. Melton* (1988) 44 Cal.3d 713, 746 [244 Cal.Rptr. 867, 750 P.2d 741]; *People v. Covington* (1934) 1 Cal.2d 316, 320-321 [34 P.2d 1019].) The court must instruct on a lesser included offense on its own motion "when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense." (*People v. Melton, supra*, 44 Cal.3d 713, 746.) Had a properly instructed jury convicted defendant of theft, the evidence would be sufficient to uphold the conviction.

People v. Ramkeesoon (1985) 39 Cal.3d 346 [216 Cal.Rptr. 455, 702 P.2d 613] presented an analogous record in that defendant was charged with robbery and murder, and the court failed to instruct on theft where the defendant testified that his intent to steal arose after the killing. There defendant's convictions of first degree murder and robbery were reversed on the ground that the trial court erred in refusing to instruct on larceny and theft as a lesser included offense of robbery.

The court in its unanimous opinion stated: "It cannot be seriously disputed that the court erred. . . . It is well settled that the trial court is obligated to instruct on necessarily included offenses—even without a request—when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. (*People v. Wickersham* (1982) 32 Cal.3d 307, 325 [185 Cal.Rptr. 436, 650 P.2d 311]; *People v. Seden* (1974) 10 Cal.3d 703, 715 [112 Cal.Rptr. 1, 518 P.2d 913].)

"The necessity for instructions on lesser included offenses is based in the defendant's constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Geiger* (1984) 35 Cal.3d 510, 519

[199 Cal.Rptr. 45, 674 P.2d 1303, 50 A.L.R.4th 1055]; *People v. Modesto* (1963) 59 Cal.2d 722, 730 [31 Cal.Rptr. 225, 382 P.2d 33].) As the United States Supreme Court explained in *Keeble v. United States* (1973) 412 U.S. 205, 212 [36 L.Ed.2d 844, 850, 93 S.Ct. 1993]: '[I]t is no answer to petitioner's demand for a jury instruction on a lesser included offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.' (See also *People v. St. Martin* (1970) 1 Cal.3d 524, 533 [83 Cal.Rptr. 166, 463 P.2d 390].)

"Clearly the evidence in this case warranted an instruction on theft as a lesser included offense. Defendant testified that he had not thought about stealing any of Mullins' property until after the assault was completed. If defendant had not harbored a larcenous intent before or during the assault, the taking was theft rather than robbery. (*People v. Green* (1980) 27 Cal.3d 1, 54 [164 Cal.Rptr. 1, 609 P.2d 468].) Although the jury was not required to believe defendant's testimony, it was credible enough to have supported a verdict of theft instead of robbery. (See *People v. Wickersham, supra*, 32 Cal.3d at p. 325.)" (*People v. Ramkeesoon, supra*, 39 Cal.3d 346, 351, italics in original.)

Defendant in the instant case, as in *Ramkeesoon*, testified that he had not thought about stealing any property until after the fight was completed. If he did not harbor larcenous intent before or during the fight, the taking was theft instead of robbery. He confessed from the witness stand to taking the television set and stealing the car. The fact that he said he panicked would not preclude a finding of theft. Defendant's testimony and the similar statements related by the psychiatrist were sufficiently credible to have supported a verdict of theft instead of robbery.

I conclude, as the majority do, that the trial court erred in failing to instruct on the lesser included offense of theft.

II. THE PREJUDICE

As in *Ramkeesoon* (*supra*, 39 Cal.3d at pp. 351-353), the error is prejudicial in the circumstances of this case. Defendant's testimony that the fight

erupted when decedent attempted to attack him sexually was plausible under the other evidence in the case.

The crucial factual issue presented by the case, since defendant admitted killing and stealing, was the time defendant formed the intent to steal.¹ Defendant testified that decedent attempted to rape him, that he responded using his buck knife to stab decedent, that they fought as he continued to cut and stab decedent, and that it was only after he found decedent dead that he decided to steal anything. There was circumstantial evidence that supported defendant's testimony. Thus, there was circumstantial evidence that in hiring defendant, who had a full-time job and lived in another city, to do gardening work, decedent may have had an ulterior sexual motive. I do not understand the majority to argue otherwise. (See maj. opn., *ante*, at p. 689.) There was also the evidence that decedent ejaculated. The prosecution presented expert testimony that ejaculation has been known to occur immediately prior to death, apparently when no sexual activity was involved. This evidence precluded the ejaculation evidence from being conclusive on the sexual-conduct issue but did not mean that the ejaculation evidence was not entitled to substantial weight in evaluating defendant's claim that decedent attacked him.

The majority fail to mention that decedent was six feet three inches tall and suffered from a weight problem. The evidence is important to the defense because it suggests that decedent probably would have been able to subdue defendant in a physical attack in the absence of any weapon. (But cf. maj. opn., *ante*, at p. 689.)

The omitted fact takes on much more importance when it is considered in the light of the prosecution's version of the facts. Both the prosecution and the defense evidence established that decedent knew defendant and knew where to find him. The prosecution theory was that defendant determined to rob decedent and determined to kill him so that he could steal decedent's possessions. Defendant's weapon was a knife, which requires close combat. It is difficult to believe that defendant formed the intent to rob and kill before he left Fresno for Merced in view of his weapon and the size of decedent. After defendant was introduced to and spoke at length with decedent's friends and acquaintances, there is little likelihood that he

¹It is apparent that the jury focused directly on the issue from the outset. A little more than an hour after retiring for deliberations, the jury asked for part of the record to be read, the testimony of defendant and the defense psychiatrist. The court suggested that the request was too broad and suggested that perhaps it could be limited to a specific point. In response to the jurors' further request, the reporter read the portion of the psychologist's testimony of defendant's statements relating to when the thought flashed through his mind whether to steal.

formed the intent to rob when he could be easily identified by decedent's friends and acquaintances. Further, it must be obvious to even the stupidest of criminals that the knife attack had to be successful on the first stab because if there was a protracted battle decedent's large stature and weight might prove determinative. Yet there was no evidence of the deep knife wound which would be expected if defendant had initiated the violent confrontation.

The majority characterize as implausible defendant's testimony that he only stole the television set from the house and did not steal the other personal property missing from the house. (See maj. opn., *ante*, at pp. 689-690.) There was some corroborative evidence that there was a second theft. Decedent's head was found resting on a pillow. Despite all of the blood on decedent, in the area and on defendant, there was no blood on the pillow, suggesting that it had been placed there after the blood had dried but before the body was discovered. In addition, although police officers searched for the missing personal property, including searching defendant's home, they were unable to find any of it, apart from the television and the automobile. Finally, after the locks were changed on decedent's house following the killing, a broken key was found in the new front door lock suggesting that some unidentified person had access to decedent's home.

While the above evidence indicating that there may have been a second theft may not be strongly persuasive, the evidence pointed to by the majority as indicating that the intent to steal was formed before the killing is, at least, equally weak. Moreover, the evidence relied upon by the majority could also be viewed consistently with defendant's claim that he formed the intent to steal after decedent was dead, and that the evidence does not show that defendant decided to rob and kill when he could be so easily identified and located.

Based on the evidence before the jury, an error in the instructions tilting the jury in favor of finding that defendant formed his intent to steal before the killing has to be prejudicial. The evidence that defendant formed the intent to steal before the fight is not overwhelming; it is not compelling or even very persuasive. On the record before us the conclusion that he killed in order to steal is barely plausible. It is likely that a properly instructed jury would have found theft rather than robbery.

The majority argue that the errors were not prejudicial because the jury resolved the issue of the time the intent to rob occurred under other, proper instructions. However, the jury findings under those instructions were the product of the errors and may not properly be relied upon to eliminate the prejudice resulting from the errors.

In *People v. Seden* (1974) 10 Cal.3d 703, 721 [112 Cal.Rptr. 1, 518 P.2d 913], it was pointed out that "in some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only a lesser offense has been committed has been rejected by the jury." The *Seden* rule has been applied in other cases of failure to instruct on a lesser included offense. (*People v. Melton*, *supra*, 44 Cal.3d 713, 746; *People v. Ramkeesoon*, *supra*, 39 Cal.3d 346, 351-353; see also *People v. Bean* (1988) 46 Cal.3d 919, 951 [251 Cal.Rptr. 467, 760 P.2d 996]; *People v. Miranda* (1987) 44 Cal.3d 57, 92 [241 Cal.Rptr. 594, 744 P.2d 1127].)

In *Seden*, *supra*, 10 Cal.3d 703, there was error in the failure to instruct on involuntary manslaughter based on the defendant's diminished capacity defense, but it was concluded that the failure to instruct was not prejudicial to the issue of intent to kill because the jury, when it concluded that the offense was first degree murder rather than second degree, necessarily rejected defendant's evidence that diminished capacity negated intent to kill. Under that determination, the offense could not have been less than voluntary manslaughter.

In *Melton*, the defendant argued that properly instructed the jury might have found that the intent to steal arose after the assault making the crime theft rather than robbery. The error in failing to instruct was found nonprejudicial because the jury had found burglary under instructions that the entry to the victim's residence must have been for the purpose of theft or robbery and the entry to the residence occurred prior to the assault. Thus, the jury had determined that the intent to steal arose prior to the assault. (44 Cal.3d at p. 746.)

However, when the subsequent instructions are merely repetitive of the incomplete instructions, it cannot be said that the jury has necessarily resolved the issue in another context under proper instructions. Our unanimous decision in *People v. Ramkeesoon*, *supra*, 39 Cal.3d 346, 352, is squarely on point. There, defendant testified that he had been invited to decedent's home, that he refused an invitation to go to bed with the victim, that the victim attacked him, that a struggle ensued during which he stabbed the victim several times, and that only after he took a shower to wash the blood away did it occur to him to steal. Theft instructions were

erroneously omitted and robbery and felony-murder instructions were given.

The fact that the jury found not only robbery but also robbery-murder did not eliminate the prejudice flowing from the error. The unanimous opinion pointed out that the "omission of the theft instructions practically guaranteed robbery and felony-murder convictions since defendant had admitted taking [decedent's] property and robbery was the only available theft offense." Similarly, in *People v. Morales* (1975) 49 Cal.App.3d 134, 139-141 [122 Cal.Rptr. 157], it was held that a verdict of robbery and of felony murder did not necessarily resolve the question that would have been properly presented by instructions on grand theft from the person, whether the force used in snatching the victim's purse was sufficient for robbery.

In the instant case, we cannot say that the jury determined in another context that the intent to steal arose before the assault. The majority first rely upon the detailed robbery instructions as showing that the theft issue was necessarily determined by the jury. Those instructions made it clear that the jury must find that defendant intended to steal prior to the use of force. However, the prejudice involved in a failure to instruct on the lesser offense is not based on a failure of the jurors to find the elements of the greater offense, as in the instant case, that the intent to steal arose before the fight. The jurors in such cases obviously found the elements of the greater offense. The prejudice lies in the danger that the jurors, to avoid acquittal of a confessed felon, leaned over backward to find the elements of the greater offense.

When there is an error in failing to instruct on a lesser included offense, the prejudice is not eliminated by proper instructions on the elements of the greater offense. For example, in *People v. Wickersham* (1982) 32 Cal.3d 307, 335-336 [185 Cal.Rptr. 436, 650 P.2d 311], the jury convicted the defendant of first-degree premeditated and deliberate murder after the trial court erroneously omitted instructions on the lesser included offense of second degree murder. It was held that "'the factual question posed by the omitted instruction'—whether appellant had acted with malice and intent, but without premeditation and deliberation—was not 'necessarily resolved adversely to the defendant under other, properly given instructions.'" (*Seden*, *supra*, 10 Cal.3d at p. 721.)"

The jury's determination based on the elements of the greater offense is not a determination in another context as occurred in *Seden*, *supra*, 10 Cal.3d 703 and *Melton*, *supra*, 44 Cal.3d 713. Use of the instructions on the elements of the greater offense to eliminate prejudice resulting from erroneous omission to instruct on the lesser would mean that the error was never

prejudicial unless there was also error in the instructions on the elements of the greater. Detailed instructions on the elements of the greater offense do not eliminate or minimize the all-or-nothing choice given to the jury by the failure to instruct on the lesser.

The felony-murder instruction and the special circumstance instruction next relied upon by the majority both were tied to the issue of robbery rather than some other offense or theft. The factual issue as to when the intent to steal occurred was the same under the robbery, the felony-murder, and the special circumstance instructions, and the jury, having determined that the intent to steal arose before the fight under fundamentally unfair instructions, could not thereafter consistently have found that the intent to steal occurred later or that there was no felony murder or special circumstance.

In both *Sedeno* and *Melton*, the tainted finding did not compel the findings relied upon to eliminate prejudice. Thus, in *Sedeno* the failure to instruct on involuntary manslaughter tainted the finding of intentional homicide, but it did not compel the jury findings of premeditation and deliberation. The jury could, consistent with the tainted finding, find second degree murder, and since the jury was free to reject premeditation and deliberation it was appropriate to rely upon the findings of premeditation and deliberation to show that the error in failing to instruct on involuntary manslaughter was not prejudicial.

In *Melton* the tainted determination of robbery that the intent to steal arose before the homicide did not require a determination that the intent to steal arose prior to entry of the house. Because consistent with the tainted finding the jury could reject burglary, the finding of burglary was not the product of the error, and it was proper to rely upon the finding to show that the tainted finding was not prejudicial.

It is simply not logical to use the products of the error to dispel the prejudice arising from the error, as the majority does. Moreover, the majority offer no valid basis to distinguish the unanimous decision in *Ramkeesoon*. It is improper to speculate that the instructions in that case on robbery and felony murder failed to set forth the elements of the offenses. If the instructions were incomplete the court in reversing the convictions obviously would have mentioned the fact.

The prejudice flowing from a failure to instruct on a lesser included offense, as we have seen, is that the jury, given the choice between conviction of the greater offense and outright acquittal, when the evidence obviously establishes some offense, is likely to resolve its doubts in favor of

conviction in violation of our most fundamental rule of criminal law. In the instant case, the jury was never given an option to find that defendant's offense was theft rather than robbery and that therefore there was no felony murder or special circumstance. Repetitious instructions on the elements of the greater offense do not eliminate the prejudice. The manifest unfairness of the original instruction as to the time the intent to steal occurred carried over to the subsequent instructions.

Accordingly, the failure to instruct on theft was prejudicial.

The judgment should be reversed.

Mosk, J., concurred.

SUPREME COURT
FILED

JUN 21 1990

Robert Wandruff Clerk

ORDER DUE

DE
ORDER DENYING REHEARING

S004658 No. Crim 24291

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE, Respondent

v.

THADDAEUS LOUIS TURNER, Appellant

APPENDIX B

ORDER OF THE SUPREME COURT OF CALIFORNIA
DENYING REHEARING (NOT REPORTED)

Appellant's petition

for rehearing DENIED.

Panelli
Acting Chief Justice

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES

CALIFORNIA PENAL CODE

section 190.2

section 190.3

CALIFORNIA PENAL CODE

§ 190.2. [Penalty upon finding special circumstance]

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or

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preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

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§ 190.2

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Added by initiative measure § 6, approved November 7, 1978.

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§ 190.3. [Determination as to penalty of death or life imprisonment]

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted

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use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
- (i) The age of the defendant at the time of the crime.

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§ 190.3

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

Added by initiative measure § 8, approved November 7, 1978.